2016

Utahstream Access Coalition Appellee v. Orange Street Development Appellant

Utah Supreme Court

39541

No. 20150439-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

UTAH STREAM ACCESS COALITION, *Appellee*,
v.
ORANGE STREET DEVELOPMENT, et al., *Appellant*.

REPLY BRIEF OF APPELLANT

On appeal from the Third Judicial District Court, Summit County,
Honorable Keith A. Kelly, District Court No. 110500360

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Dismissed defendants:

Utah Division of Wildlife Resources
Utah Division of Parks and Recreation
Sheriff David A. Edmunds, in his official capacity as Summit County Sheriff

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Introduction

The district court erred when it declared that the State owned title to the bed of the Weber River through the section of river at issue here. The Utah Stream Access Coalition (USAC) lacked standing to bring a title claim on behalf of the State, and the district court, therefore, lacked jurisdiction to declare title in the State. The district court also plainly erred in failing to apply the statutory test for navigability set out in HB 141. The state navigability test for *recreational access* is based on present-day commercial use, whereas the federal navigability test for *title* looks to the date of statehood. Finally, even if the statute had adopted the federal test for navigability, the court erred when it ruled that the floating of logs during temporary times of high water is enough to satisfy the federal test.

Argument

1. The district court erred in declaring that fixed title to the streambed in the State because USAC did not have standing to seek such a determination and the trial court therefore lacked jurisdiction to grant it

The district court, in its ruling of April 10, 2015, declared that (i) the public is "entitled to use the riverbed of the Weber River at [the location of Landowner Properties] for lawful recreational purposes," and (ii) "the State of Utah holds sovereign land title to the bed . . . at the location of the Landowner Properties." (R. 892.) In its opening brief, Orange Street argued that the district court erred in making the title-declaration because the State had made no claim for a title determination and USAC lacked standing to seek one. Orange St. Opening Br. at

29-33. In its response brief, the State agreed that the district court's title declaration should be vacated for lack of jurisdiction. State Resp. Br. at 22-29. As the State noted, "[a] quiet title case would require a different plaintiff, a different cause of action, and a different form of relief." *Id.* at 24.

USAC is ambivalent in its response to Orange Street's argument. Although it originally asked the district court to determine title in its complaint, (R. 8-9.), it later told the district court that it was not seeking a title determination. (R. 337.) In its brief to this court, it repeatedly states that it is not seeking to have title quieted in the State. USAC Resp. Br. at 18 n.4, 20, 26, 30. Yet USAC spends considerable time briefing why it should have standing to raise the question of title. *Id.* at 18-31. The reason seems to be USAC fears that if this court accepts Orange Street's separate argument that HB 141 did not adopt the federal navigability for title test, USAC, for some reason, will be denied standing to claim an alternative right of recreational access under the Utah Constitution. *Id.* at 18-19. Orange Street has made no such argument.

Orange Street's position is that members of the public who claim denial of access to public waters to which they are entitled under HB 141 have standing to bring an action to assert that right of access, if they meet the usual standing tests. But no claim of a right of access should give standing to assert, on behalf of the State of Utah, a claim to have title quieted in the State on grounds of navigability for title. The concern that seems to prompt USAC to hedge its repeated

disavowals of a right to seek a title determination is not grounded in any position taken by Orange Street.[1] The relief of a title declaration that property belongs to the State can only be given at the request of the State. A private party without any associated interest does not have standing to make such a claim.

The district court's entry of a declaration of title in the State presents a troubling precedent to private landholders. It permits parties without tangible interests in property to obtain a title declaration that may remove certain of the landowners' property rights with potentially far-ranging consequences. The issue is similarly troublesome for the State, which is justifiably concerned about the orderly administration of public property and land titles. This case is not about title, but about access to public waters. Because USAC, who has no claim to title, does not have standing to litigate the rights of the State to the bed of the Weber River under HB 141, this court should vacate the district court's title determination for a lack of jurisdiction.

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[1] The reason for USAC's hedging on the question of standing appears to be that it separately contends its members have a constitutional right founded in article XX, section 1 of the Utah Constitution to access waters that qualify as navigable under the federal title test, regardless of the Utah Legislature's enactment of HB 141. USAC Resp. Br. at 26, 30-31. But that issue was not addressed by the district court and is not before this court in this case. This case only involves access under HB 141. The article XX, section 1 issue is one of several before this court in the separate case of *Utah Stream Access Coalition v. VR Acquisitions, LLC*, No. 20151048-SC.

2. The language of the navigation definition in HB 141 does not track the federal test; this court should clarify the statutory test for access

Orange Street argued in its opening brief that the language of the navigability test in HB 141 does not track the federal navigability for title test. Orange St. Opening Br. at 33-38. HB 141's navigability test reads in the present tense. Utah Code § 73-29-102(4). It requires a determination of the present susceptibility of a water's use for commerce and as a public highway of transportation. In contrast, the federal navigability test for title asks after the susceptibility of a water's use for trade and travel at statehood. *United States v. Utah*, 283 U.S. 64, 75 (1931) ("In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within Utah passed to that state when it was admitted to the Union, if the rivers were then navigable . . . ."); Orange St. Opening Br. at 35-37.[2] The State and USAC acknowledge this critical time difference in the text of HB 141, but argue that the intention of the drafters as determined from the legislative history suggests that they intended to use the federal navigability test for title. State Resp. Br. at 9-10; USAC Resp. Br. at 33.

This court has held that the text is primary when interpreting a statute.

> Our evaluation of the statute's purpose must start with its text, not the legislative history. Where the statute's language marks its reach in clear and unambiguous terms, it is our role to enforce a legislative purpose that matches those terms, not to supplant it with a narrower

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[2] Orange Street did not raise this issue below. But the plain error doctrine permits this court to address it. Orange Street Opening Br. at 34-37. The variance between the text and the test applied by the district court warrants this court's attention. The consequences for owners of property along bodies of water require clarification of the relevant test, either by this court or the legislature.

> or broader one that we might infer from the legislative history. That history might identify a social problem that first sparked the legislature's attention. But we cannot presume that the legislature meant only to deal with that particular problem, as legislative bodies often start with one problem in mind but then reach more broadly in their ultimate enactment. And when they do, we cannot limit the reach of their enactment to the ill that initially sparked their interest.

Hooban v. Unicity Intern., Inc., 2012 UT 40, ¶ 17, 285 P.3d 766 (citations omitted); *see also Bd. of Governors of Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."); *Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[T]he reach of a statute often exceeds the precise evil to be eliminated."). That a state legislature might adopt a state test of navigability at odds with the federal navigability test for title is not unlikely. Many have done precisely that for various reasons.[3]

If the court adopts the literal definition of "navigability" in HB 141, that definition requires a showing of current susceptibility for use for commerce and as a public highway of transportation. Orange St. Opening Br. 34-36. While there was some slight reference to the susceptibility of these waters to modern boat travel, there was no evidence of commerce. *Id.* at 36. This requires a reversal of the district court's determination that USAC is entitled to access under HB 141.

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[3] Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53 (2010) (includes an extensive appendix detailing navigability laws in the western states) attached as Addendum A. Craig's article includes an extensive appendix detailing navigability laws in the western states.

3. Neither log drives alone nor use during temporary high water satisfy the federal navigability for title test

Assuming the federal navigability for title test is the test incorporated in HB 141, this court has been presented with two straightforward questions about how that test is satisfied. First, is evidence of occasional log drives only, without evidence of use of watercraft for transportation, enough to show susceptibility to use for commerce and transportation?[4] Second, is evidence of a water's susceptibility to use for commerce during times of temporary high water enough to satisfy the federal test?

The United States Supreme Court has not directly addressed the issue, though the inferences to be fairly drawn from its navigability for title cases support Orange Street in answering both questions in the negative. Orange Street Opening Br. at 39-43, 51-52. On the whole, the various lower court cases support Orange Street's position, and those few seemingly against it are analytically suspect. *Id.* at 44-54. The State has not addressed the issue on appeal, but concluded in its trial brief that "the Weber River's relatively low flows, steep

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[4] Susceptibility of use does not require actual proof of use. "The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved." *United States v. Utah*, 283 U.S. 64, 82 (1931). Present day use, while helpful, "must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at statehood." *PPL Montana v. Montana*, 132 S.Ct. 1215, 1233 (2012).

gradient, and short, inconsistent window of annual utility, raise questions regarding whether it was navigable-in-fact in 1896." (R. 647)

Orange Street will not revisit arguments already made in the opening briefs on the merits of the question. Instead, it will briefly address two points not raised earlier, one legal and one practical. First, in *PPL Montana v. Montana*, the U.S. Supreme Court said nothing about log floating as a basis for navigability, even though the issue was briefed. 132 S.Ct. 1215 (2012). Instead, the Court focused on the absence of boat travel in declaring the Missouri River non-navigable through the Great Falls reach. *Id.* at 1232.

In *PPL Montana*, Montana argued that logs floating on the Madison River were enough to establish susceptibility for commerce and to satisfy the federal navigability test. Br. of Resp't, State of Montana, p. 21, attached as Addendum B; see also Br. of Amicus Curiae, Nat'l Wildlife Fed. et al., p. 25, attached as Addendum C. In deciding that the Missouri River through the Great Falls reach was not navigable at statehood, and in discussing the facts relevant to determining the susceptibility of a waterway being used for trade and travel, the Court never addressed the issue of the floating of logs.[5] *PPL Montana*, 132 S.Ct. at 1232-33. Rather, it held that the fact that portages were required around the

[5] In fact, no evidence of log floats on the Missouri River was presented to the court. But this argument is not about whether log floats actually occurred on the river, but whether the river was susceptible to log floats at statehood and was that enough to satisfy navigability requirements.

Great Falls reach defeated title for navigability purposes. *Id.* at 1232. Relying only on the passage of watercraft, the court stated:

> [T]he Court sees no evidence in the record that could demonstrate that the Great Falls reach was navigable. Montana does not dispute that overland passage was necessary to traverse the reach. Indeed, the State admits the falls themselves were not passable by boat at statehood. And the trial court noted the falls had never been navigated.

Id. (internal quotation marks and citations omitted). In other words, because boats had to portage around the falls, the river was not navigable.

If susceptibility to floating logs was all that was required for navigability for title, the outcome would have been different; logs can float over waterfalls and rapids where boats cannot go. Nor was there an issue about low water. Boats were able to be navigated above and below the Great Falls reach. The only reason the Court concluded that the segment was non-navigable was because "the falls themselves were not passable by boat at statehood." *Id.* Orange Street urges this court to follow the Supreme Court's lead and hold that the use of boats is necessary to establish navigability for title purposes.

Second, and practically, Orange Street notes that if susceptibility to the floating of logs alone is enough to establish navigability for title purposes, stretches of Utah's rivers previously determined non-navigable may be opened up to a new navigability for title analysis. In other words, the stability of landowners' previously decided entitlement or lack of entitlement to ownership of beds may be brought into question. For example, in *United States v. Utah*, the

Supreme Court decided navigability for title issues regarding the Green River, Colorado River, and the Grand River (currently the Colorado River above its confluence with the Green River). 283 U.S. 64 (1931). A section of the Colorado River through Cataract Canyon was deemed non-navigable because of its rapid descent and dangerous rapids. *Id.* at 80. The United States, as the owner of the adjacent land in Cataract Canyon, therefore has title to the bed underlying that non-navigable section. *Id.* at 74. Again, like the Missouri River in *PPL Montana*, the decision was not based on insufficient water to carry watercraft. Sections above and below Cataract Canyon were deemed navigable because boats had been on those sections or they were susceptible to such use. *Id.* at 89-90. If a log floating down the river is enough to make the water way susceptible to commerce, then the United States' title in Cataract Canyon may very well be void and Utah may own those beds.[6]

For these reasons, and the reasons stated in its opening brief, Orange Street asks the court to reverse the district court's ruling and conclude that the one mile stretch of the Weber River at issue in this case is not navigable.

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[6] Similarly, the San Juan River was determined to be non-navigable from Chinle Creek (5 miles below the town of Bluff) to its confluence with the Colorado River, a total of 133 miles. *Utah*, 283 U.S. at 74. Portions of this river are likely able to float logs and thus be considered navigable under USAC's test. Adjacent landowners include the United States, the Navajo Nation, and private interests in the town of Mexican Hat. Instability of title would open up the possibility of quiet title actions for all of these land owners.

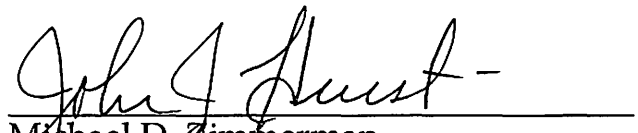
Conclusion

The district court erred in entering a ruling concluding that the State holds title to the bed of the Weber River where it crosses Orange Street's property because USAC lacks standing to challenge Orange Street's title. The district court also plainly erred in not applying the statutory test for navigability set out in HB 141. Finally, even if the federal navigability for title test is the HB 141 test, the district court failed to apply the proper test.

This court should vacate the title determination and reverse the finding of navigability and of a right in USAC's members to access Orange Street's property for recreational purposes.

DATED this 17th day of June, 2016.

ZIMMERMAN JONES BOOHER



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I hereby certify that:

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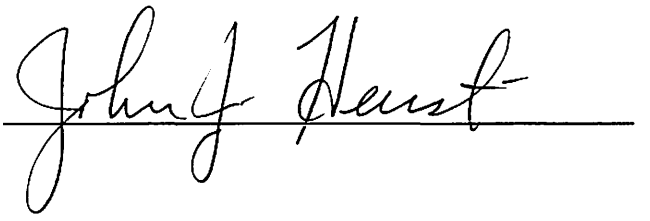

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This is to certify that on the 17th day of June, 2016, I caused two true and correct copies of the Reply Brief of Appellant to be served on the following via first class mail, postage prepaid:

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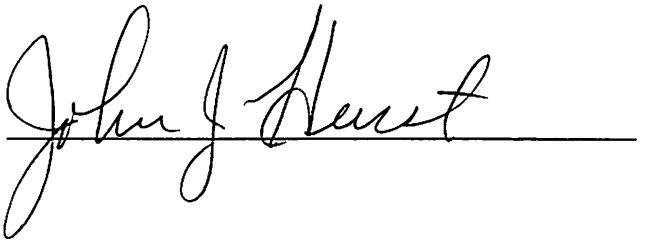

A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust

*Robin Kundis Craig**

This companion Article to the fall 2007 A Comparative Guide to the Eastern Public Trust Doctrines *explores the state public trust doctrines—emphasis on the plural—in the nineteen western states. In so doing, this Article seeks to make the larger point that, while the broad contours of the public trust doctrine have a federal law basis, especially regarding state ownership of the beds and banks of navigable waters, the details of how public trust principles actually apply vary considerably from state to state. Public trust law, in other words, is very much a species of state common law. Moreover, as with other forms of common law, states have evolved their public trust doctrines in light of the particular histories and the perceived needs and problems of each state.*

This Article observes that, in the West, four factors have been most important in the evolution of state public trust doctrines: (1) the severing of water rights from real property ownership and the riparian rights doctrine; (2) subsequent state declarations of public ownership of fresh water; (3) clear and explicit perceptions of the scarcity of water and the importance of submerged lands and environmental amenities; and (4) a willingness to consider water and other environmental issues to be of constitutional importance and/or to incorporate broad public trust mandates into statutes. From these factors, two important trends in western states' public trust doctrines have emerged: (1) the extension of public rights based on states' ownership of the water itself; and (2) an increasing, and still cutting-edge, expansion of public trust concepts into ecological public trust doctrines that are increasingly protecting species, ecosystems, and the public values that they provide.

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The Article includes an extensive appendix that summarizes each of the nineteen states' public trust doctrines. These summaries include relevant constitutional provisions, statutory provisions, and cases.

INTRODUCTION

In the arid West, balancing private needs for fresh water to consume against the public values—recreational, aesthetic, and ecological—served by leaving fresh water in situ has tended to favor the private use side. Evidence of this result is both massive and minor, ranging from California's multi-billion-dollar water transportation system,[1] to the routine de-watering of the Colorado River so that little to no water reaches the Sea of Cortez,[2] to water-related Endangered Species Act lawsuits in dozens of watersheds.[3]

One of the legal tools that can re-balance private and public rights in water in any particular state is that state's public trust doctrine. In 1970, Professor Joseph Sax published his seminal article arguing for revitalization of the public trust doctrine,[4] and, ever since, academics, politicians, voters, and judges have been exploring the potential value of the public trust doctrine for protecting public values in water, including recreational and ecological values.[5]

This Article is the second of two that explore what states are actually doing with their public trust doctrines–emphasis on the plural. As I argued in the first article,[6] which covered the thirty-one eastern states' public trust doctrines, the states have progressed and diverged in interesting ways beyond

1. By September 30, 2006, the total construction costs of the CVP had reached approximately $3.4 billion. U.S. GOV'T ACCOUNTABILITY OFFICE, BUREAU OF RECLAMATION: REIMBURSEMENT OF CALIFORNIA'S CENTRAL VALLEY PROJECT CAPITAL CONSTRUCTION COSTS BY SAN LUIS UNIT IRRIGATION WATER DISTRICTS 2 (2007), *available at* http://www.gao.gov/new.items/d08307r.pdf.

2. ROBERT W. ADLER, RESTORING COLORADO RIVER ECOSYSTEMS: A TROUBLED SENSE OF IMMENSITY 34 (2007); Robin Kundis Craig, *Climate Change, Regulatory Fragmentation, and Water Triage*, 79 U. COLO. L. REV. 825, 826–27, 897–98 (2008).

3. Craig, *supra* note 2, at 875–78.

4. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

5. *See, e.g.*, Marc R. Poirer, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SE. ENVTL. L.J. 71 (2006); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SE. ENVTL. L.J. 223 (2006); Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322 (2006); Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005).

6. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 113 (2007).

the precepts of the U.S. Supreme Court's seminal discussion of the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*.[7]

In some ways, what was true for the eastern states is also true for the western states. A state's public trust doctrine outlines public and private rights in water and submerged lands by delineating five components of those rights: (1) the beds and banks of waters that are subject to state/public ownership; (2) the line or lines dividing private from public title in those submerged lands; (3) the waters subject to public use rights; (4) the line or lines in those waters that mark the limit of public use rights; and (5) the public uses that the doctrine will protect in the waters where the public has use rights.[8]

In addition, prior discussions of western public trust doctrines are subject to the same two general limitations I discussed for the eastern public trust doctrines: "The first is a tendency to generalize all public trust law into a single doctrine. The second and opposite tendency is to view each state's public trust doctrine as unique."[9]

Nevertheless, public trust doctrine law in the western states can be differentiated from that in the eastern states in several respects. First, in the eastern states, coastal access, coastal development, and coastal rights have generally been of more pressing concern than public trust rights in fresh waters. Because of the timing of their statehood, many eastern states' public trust doctrines have been influenced in significant ways by the English "ebb-and-flow" tidal test of navigability for purposes of state title.[10] In addition, many eastern states recognize different public/private title lines along the sea coasts and Great Lakes than they do in fresh water streams, rivers, and lakes and/or protect more extensive sets of public rights in the ocean and Great Lakes.[11] In contrast, most western states became states *after* the U.S. Supreme Court had outlined most of its core principles regarding navigable waters, and far fewer of them are coastal states—only Alaska, California, Hawai'i, Oregon, Texas, and Washington. Partially as a result of this timing and geographical reality, western states, in general, have paid far greater attention than eastern states to public rights in fresh waters.

In addition, western states are more arid than eastern states, resulting in a consciousness of the importance of fresh water that pervades many of these states' public trust doctrines. The Hundredth Meridian, which runs through North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas, is generally considered the "water divide" of the United States—east of that line, there is generally enough rainfall to support farming without irrigation; west of

7. 146 U.S. 387 (1892).
8. Craig, *supra* note 6, at 4.
9. *Id.* at 2–3.
10. *Id.* at 11–14.
11. *Id.* at 16–17.

the line, there generally is not.[12] Survival in the west depends on access to water, and water is generally viewed as being in short supply. As will be discussed, this perception of shortage or potential shortage of fresh water has influenced the public trust doctrine in many western states.

Further, the western states use a different system of water law than the eastern states. Eastern states' water laws are founded on common-law riparianism,[13] although many states have transitioned to regulated riparian systems.[14] Riparianism incorporates notions of adjustable, correlative rights to water among riparian property owners, with a general expectation—couched originally in terms of a "natural flow" doctrine and more recently in terms of "reasonable use"—that there is enough water to both serve human needs and leave water in the natural system. In contrast, western states (with the notable exception of Hawai'i) base their water law on prior appropriation, including states like California that retain limited riparian rights.[15] Prior appropriation is based on the principle of "first in time, first in right" and acknowledges through its priority system that water supplies from a given source will sometimes—maybe often—be insufficient to meet all needs. Thus, prior appropriation as a legal system acknowledges that fresh water is in short supply. In practice, however, prior appropriation systems have allowed appropriators to drain streams and rivers dry, making obvious the loss of public values such as navigation, fishing and other recreation, aesthetics, species, biodiversity, water quality, ecological health, and, more recently, ecosystem services.

Finally, in almost all prior appropriation states, state water law includes a declaration, constitutional or statutory, that the state or the public owns the fresh water itself. Legally, these declarations dissociate control over the water from land ownership, including submerged land ownership. For public trust purposes, therefore, such declarations leave western states free to impress waters with public trust protections entirely independently of state ownership of the beds and banks of navigable waters, extending many state public trust doctrines to non-navigable waters.

All of these features of prior appropriation water law have become relevant to states' public trust doctrines in the West. Indeed, western public trust common law reflects conscious struggles, often lacking in the eastern states, regarding the legal relationship between private appropriative water rights, on the one hand, and public rights and values in water, on the other.

12. HERBERT C. YOUNG, UNDERSTANDING WATER RIGHTS AND CONFLICTS 42 (2d ed. 2003).

13. George A. Gould, *Water Rights Systems*, *in* WATER RIGHTS OF THE EASTERN UNITED STATES 8–9 (Kenneth R. Wright, ed., 1998).

14. Richard F. Ricci et al., *Battles over Eastern Water*, 21 NAT. RESOURCES & ENVT. 38, 38 (2006); Jeremy Nathan Jungreis, *"Permit" Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East*, 29 HARV. ENVTL. L. REV. 369, 370–71 (2005).

15. Gould, *supra* note 13, at 7.

This Article explores these and other features of western states' public trust doctrines, identifying broad categories of how these nineteen states have developed their common law regarding public rights in water. The Article is both classificatory and comparative, first identifying categories of trends among the western states and then comparing those approaches to demonstrate the different ways that their public trust doctrines have developed.

At the same time, this Article seeks to make the larger point that, while the broad contours of the public trust doctrine have a federal law basis, especially regarding state ownership of the beds and banks of navigable waters, the details of how public trust principles apply vary considerably from state to state. Public trust law, in other words, is very much a species of state common law. Moreover, as with other forms of common law, states have evolved their public trust doctrines in light of the particular histories and perceived needs and problems of each state. As Professors Robert Abrams and Noah Hall have observed more generally for all of water law, any given state's public trust doctrine "evolves instrumentally in ways that support a society's most pressing needs. The periods of greatest change in water law tend to be the ones where serious and protracted shortage or unsatisfied demand is felt in one or more key economic sectors."[16] Therefore, is it perhaps unsurprising that more robust public trust doctrines have evolved in states such as Hawai'i, California, and Montana where water- and environment-based tourism and recreation are important contributors to the states' economies.

Part I of this Article provides a brief history of the public trust doctrine, including its development before the formation of the United States and emphasizing its public rights nature. Part II outlines the federal contours of state public trust doctrines, including the federal law of state title to navigable waters, the U.S. Supreme Court's pronouncements regarding the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*,[17] and the Supreme Court's further elaborations regarding states' authority to define rights to and in water. Part III identifies and compares many of the trends in western states' public trust doctrines, emphasizing moments when particular states' courts and, less often, legislatures, acknowledge the evolving nature of public trust principles and the need to protect public values recognized to be in short and decreasing supply. The Article concludes with a short examination of the implications of state public trust doctrines as a form of common law, arguing against the utility of continuing to describe a single public trust "doctrine," particularly as western states face unprecedented water supply pressures from climate change.

16. Robert H. Abrams & Noah D. Hall, *Framing Water Policy in a Carbon Affected and Carbon Constrained Environment*, 49 NAT. RESOURCES 1 (2009).

17. 146 U.S. 387 (1892).

I. HISTORICAL VIEWS OF PUBLIC INTERESTS IN WATER

As many writers have explained in varying degrees of detail, the public trust doctrine has an extensive history dating back to Roman law.[18] A short review of this history is useful to underscore the concern for the public interests in water that the public trust doctrine has always addressed.

As the U.S. Supreme Court has recognized, "navigable waters uniquely implicate sovereign interests."[19] It has traced the protections for public rights in water to the Institutes of Justinian,[20] which stated that "'[r]ivers and ports are public; hence the right of fishing in a port, or in rivers are in common . . . .'"[21] Such principles also have a long history in English common law:[22] "[t]he Magna Carta provided that the Crown would remove 'all fish-weirs . . . from the Thames and the Medway and throughout all England, except on the sea coast.'"[23]

The recognition of public interests and rights in waters has led to the division of title in navigable waters between the jus privatum and jus publicum. The jus privatum is the naked legal title to submerged lands, which may in fact end up in private ownership.[24] However, private title to such lands generally excludes the difficult-to-alienate jus publicum, which protects public access to and rights to use navigable waters.[25] The jus publicum may be protected legally

18. For more extensive discussions of the public trust doctrine's history, see Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SE. ENVTL. L.J. 47, 50–54 (2006); Eric Nelson, *The Public Trust Doctrine and the Great Lakes*, 11 ALB. L. ENVTL. OUTLOOK J. 131, 136–40 (2006); George D. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 BOSTON C. ENVTL. AFF. L. REV. 307, 310–14 (2006); Henquinet & Dobson, *supra* note 5, at 24–30; Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 61–86 (2005); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633–36 (1986); Joseph L. Sax, *supra* note 4, at 475–78.

19. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 284 (1997).

20. *Id.*

21. *Id.* (quoting INSTITUTES OF JUSTINIAN, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841)).

22. "The special treatment of navigable waters in English law was recognized in Bracton's time. He stated that '[a]ll rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public.'" *Id.* (quoting 2 H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 40 (S. Thorne transl. 1968)).

23. *Id.* (quoting M. EVANS & R. JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 53 (1984), and citing Martin v. Waddell's Lessee, 41 U.S. 367, 410–13 (1842) ("tracing tidelands trusteeship back to Magna Carta")).

24. Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1, 25, 42 (2009); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 122–23 (2009); Charles G. Stevenson, *Title of Land under Water in New York*, 23 YALE L.J. 397, 399, 402–03 (1914).

25. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 284, 286 (quoting Shively v. Bowlby, 152 U.S. 1, 13 (1894)); New Jersey v. Delaware, 291 U.S. 361, 373–74 (1934); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458, 466 (1892).

in a number of ways. For example, in 1838, the U.S Supreme Court concluded that because

> the Potomac river is a navigable stream, a part of the jus publicum, any obstruction to its navigation would, upon the most established principles, be what is declared by law to be a *public nuisance*. A public nuisance being the subject to criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated; and the person who caused it may be punished. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because to that extent he has suffered beyond his portion of injury, in common with the community at large.[26]

Thus, according to the Court, the quintessential protection of the jus publicum is a *public* nuisance lawsuit, preferably brought by the states themselves. Private individuals may protect the jus publicum, but only to the extent that they have suffered unusual private damages.

Building on this history, the U.S. Supreme Court in 1892 adopted the New York courts' view that:

> "The title to lands under tide waters, within the realm of England, were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. . . .
>
> "The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right."[27]

26. Mayor of City of Georgetown v. Alexandria Canal Co., 37 U.S. 91, 97–98 (1838).

27. *Ill. Cent. R.R.*, 146 U.S. at 458 (quoting People v. New York & S.I. Ferry Co., 68 N.Y. 71, 1877 WL 11834, at *3 (1877)); *see also Shively*, 152 U.S. at 11 ("By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, jus privatum, in such lands, as of waste

Thus, as a matter of both public policy and international consensus, the Supreme Court early on connected the overall protection of public rights in navigable waters to the protection and promotion of commerce and economic growth.

Moreover, the federal government's early conveyances of title to riparian properties in federal patents also reflect these public values. Grants of land bordering navigable streams generally conveyed title that extended only to the stream, which remained a "public highway."[28] Grants of land bordering rivers above tide-water conveyed exclusive right and title to the center of the stream, unless otherwise specified, but the public retained an easement or right of passage along navigable streams—waters navigable for "boats and rafts."[29] In other words, in the tidally influenced navigable waters, private landowners claiming title through federal patents had no property rights sufficient to interfere with public rights of commerce and navigation. Moreover, the U.S. Supreme Court extended this rule to federal patents of land bordering navigable-in-fact waters.[30]

Thus, the Supreme Court has repeatedly recognized that protecting public rights in water, and limiting interfering private rights, promotes the overall well-being of the nation by promoting navigation, trade, and commerce. These and other public policy considerations remain relevant to the western states' implementation of their public trust doctrines.

II. FEDERAL LAW COMPONENTS OF STATE PUBLIC TRUST DOCTRINES

As noted above, the U.S. Supreme Court has repeatedly emphasized that the submerged lands beneath navigable waters are subject to special considerations because of their connections to sovereignty. However, the sovereignty to which the Court usually refers, at least in the public trust context, is state sovereignty. In 1842, the Court declared that "when the [American] revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable

and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit.").

28. Saint Paul & Pac. R.R. Co. v. Schurmeier, 74 U.S. 272, 287 (1868).

29. *Id.*

30. *See, e.g.*, Barney v. City of Keokuk, 94 U.S. 324, 336 (1876) (stating as a general rule that private title to lands under navigable-in-fact waters extends only to the high-water mark); *Shively*, 152 U.S. at 11, 49–50 (adopting the English common law rule that federal conveyances go to the high-water mark). In the most generalized sense, waters are "navigable in fact" when they can actually be used for navigation, regardless of their immediate connection to the sea. Thus, in the United States, the adoption of a "navigable in fact" test reflected a need to move away from the English tidal test, where waters are deemed "navigable" only if they are subject to the ebb and flow of the tide. That said, however, defining "navigable in fact" has become a bit of an art in American water law, and several definitions potentially apply, depending on the regulatory context. For a taste of these complications, see *infra* notes 46–58 and the accompanying text.

waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."[31]

The Supreme Court's most explicit articulation of the public trust doctrine is found in the 1892 case of *Illinois Central Railroad Co. v. Illinois*.[32] The decision had the effect of reifying the doctrine's existence in American law while simultaneously adapting it to the particular conditions of the United States. Moreover, *Illinois Central Railroad* provided an apparent federal law basis for many later state pronouncements of their own public trust doctrines.

The legal basis—federal common law, federal constitutional law, or state law—for some aspects of the Court's pronouncements regarding the public trust doctrine, such as the alienability of public trust lands, is questionable.[33] Such haziness of source, however, did not prevent many western states—particularly Arizona—from adopting the Supreme Court's statements as binding federal law. As Richard Lazarus has observed, "[s]tate courts have repeatedly turned to [federal pronouncements] in the late nineteenth and early twentieth centuries to justify rejecting or at least carefully scrutinizing shortsighted or even corrupt legislative attempts to convey into private hands critical coastal or inland waterway resources."[34]

The states' implementations of their own public trust doctrines began with the assertion of state ownership of the beds and banks of navigable waters. In the context of title disputes between the federal and state governments (as opposed to title disputes between state governments and private landowners), the question of title to these beds and banks is clearly a matter of federal law.[35] Western states such as Oregon and Utah played pivotal roles in developing the jurisprudence of "state title navigability," which uses one definition of "navigable waters" to determine whether a state has title to the beds and banks of—and hence control over—a given waterway,[36] further evidencing the western states' interests in controlling their fresh waters.

The U.S. Supreme Court has made it clear that, once federal law has conferred title to the beds and banks of navigable waters on a particular state, that state has broad authority to redefine the property rights between itself and

31. Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842).

32. *Ill. Cent. R.R.*, 146 U.S. 387 (1892).

33. *See, e.g.*, Richard J. Lazarus, *supra* note 18, at 639–40 ("It is far from clear what source of law the Court was drawing upon to reach its result."); Appleby v. City of New York, 271 U.S. 364, 395 (1926) (stating that the alienability ruling in *Illinois Central* was based on state law).

34. Lazarus, *supra* note 18, at 640.

35. Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14 (1935); United States v. Utah, 283 U.S. 64, 75 (1931).

36. Definitions of "navigable waters" vary among legal contexts. For example, "navigable waters" are defined differently for: (1) state title purposes; (2) the federal Commerce Clause power; (3) federal jurisdiction under the federal Clean Water Act; (4) federal jurisdiction under the Rivers and Harbors Act; (5) federal jurisdiction under the Federal Power Act; and (6) admiralty and maritime jurisdiction. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 30 (3d ed. 2006).

its citizens.[37] Similarly, the states have broad authority to define the public and private rights in navigable waters themselves.[38]

A. State Ownership and Control of Submerged Lands

1. The Basic Rules

The original thirteen states acquired title to beds and banks underlying tidal and, as would later be confirmed, navigable-in-fact nontidal waters as a result of their conquest of England.[39] All other states—including all of the western states—acquired ownership of the beds and banks of these waters upon their statehood as a result of the Equal Footing Doctrine, under which all subsequent states were admitted with the same rights as the original thirteen.[40] A given state's title to tidal and navigable waters is fixed as of the date of its admission to the United States.[41]

Under federal law, the default rule and strong presumption is that a state owns the beds of the navigable waters within its borders.[42] Sovereign ownership of tidal waters—waters affected by the ebb and flow of the tide—arises as a direct adoption of English common law.[43] Moreover, the U.S. Supreme Court clarified in 1988 that states own the beds of *all* tidal waters, whether or not those waters are navigable-in-fact.[44] State title, however, is "subject always to the paramount right of [C]ongress to control . . . navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states."[45]

37. Hardin v. Jordan, 140 U.S. 371, 380 (1891); Packer v. Bird, 137 U.S. 661, 669 (1891); Shively v. Bowlby, 152 U.S. 1, 40 (1894); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370–72 (1977) (overruling Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)).

38. Arkansas v. Tennessee, 246 U.S. 158, 176 (1918).

39. *Bonelli Cattle Co.*, 414 U.S. at 317–18, *overruled on other grounds by Corvallis Sand & Gravel Co.*, 429 U.S. at 370–72; *Utah v. United States*, 403 U.S. at 10; Den *ex dem.* Russell v. Ass'n of Jersey Co., 56 U.S. 426, 432 (1853); Pollard's Lessee v. Hagan, 44 U.S. 212, 223 (1845); Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842).

40. *See* Idaho v. United States, 533 U.S. 262, 272 (2001); *see also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283–84 (1997); United States v. Alaska, 521 U.S. 1, 5 (1997); Montana v. United States, 450 U.S. 544, 551 (1981); *Bonelli Cattle Co.*, 414 U.S. at 317–18; United States v. Holt State Bank, 270 U.S. 49, 55 (1926); *Shively*, 152 U.S. at 48–50; Weber v. Bd. of Harbor Comm'ners, 85 U.S. (18 Wall.) 57, 65–66 (1873); Mumford v. Wardell, 73 U.S. (6 Wall.) 423, 436 (1867).

41. *Corvallis Sand & Gravel Co.*, 429 U.S. at 370–71 (citing Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839)).

42. *See Idaho v. United States*, 533 U.S. at 272–73; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 282; *United States v. Alaska*, 521 U.S. at 34; Utah Div. of State Lands v. United States, 482 U.S. 193, 197–98 (1987); *Montana v. United States*, 450 U.S. at 552; *Shively*, 152 U.S. at 26–50 (1894).

43. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892); Barney v. City of Keokuk, 94 U.S. 324, 336–38 (1876).

44. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476–81 (1988).

45. *See Ill. Cent. R.R.*, 146 U.S. at 435; *see also* Pollard's Leesee v. Hagan, 44 U.S. 212, 223 (1845).

In contrast, state ownership of non-tidal "navigable-in-fact" waters was a federal adaptation of English law to American realities. Thus, for example, the Great Lakes "possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide," and hence "there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."[46] Even earlier decisions of the U.S. Supreme Court had announced a "navigable-in-fact" test for inland rivers and streams.[47] However, waters must be navigable-in-fact as of the date of the state's admission into the union.[48]

2. *The Federal Test of Navigability for Navigable-in-Fact Waters*

As noted, state title to the beds and banks of navigable-in-fact waters is a question of federal law, determined in accordance with the federal test of navigability for state title.[49] Nevertheless, the Supreme Court has not been uniformly consistent in how it defines "navigable" waters for these purposes. Under the classic test of navigability from *The Daniel Ball*, waters

> are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[50]

The *Daniel Ball* test thus closely aligns navigability with usefulness in *interstate* commerce, suggesting that waterways must be navigable by fairly large boats and ships.

46. *Ill. Cent. R.R.*, 146 U.S. at 435–37.

47. *See, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (holding that the English common law tidal test has no applicability in the United States); *Barney*, 94 U.S. at 336 (stating that, "[i]n this country, as a general thing, all waters are deemed navigable which are really so").

48. Utah v. United States, 403 U.S. 9, 10 (1971) (citing Shively v. Bowlby, 152 U.S. 1, 26–28 (1894); Martin v. Waddell's Lessee, 41 U.S. 367, 410, 316–17 (1842)); United States v. Oregon, 295 U.S. 1, 14 (1935).

49. *Utah v. United States*, 403 U.S. at 10 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563).

50. *See The Daniel Ball*, 77 U.S. (10 Wall.) at 563; *see also Utah v. United States*, 403 U.S. at 10–11 (citing *The Daniel Ball* as the first important test of navigability for state title purposes and stating that that test applies to all waters, not just rivers).

However, the Supreme Court has also stated that a waterway is navigable when it is useful for trade, agriculture, or commerce by any kind of vessel. For example, in *The Montello,* the Court concluded:

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."[51]

Moreover, in the course of adjudicating the navigability of waterbodies in western states, the Court has emphasized that the water need not be "part of a navigable or interstate or international commercial highway" in order for the state to take title to its bed.[52]

Thus, depending on where a state court wants to focus its attention, the U.S. Supreme Court's statements regarding navigability for state title purposes allow for both liberal and stringent approaches to claiming title and, as a consequence, asserting and protecting public rights. The Court itself, however, attempted to reconcile its various definitions of navigability in two cases from the 1930s involving allegedly navigable waters in Utah and Oregon. The 1931 Utah case resolved Utah's claims of title to the submerged lands beneath the Green, Grand, and Colorado Rivers in Utah's favor.[53] The Court first reiterated that states received title to the submerged lands of navigable waters, while the federal government retained title to those beneath non-navigable waters, with the question of title navigability to be resolved by federal law.[54] It then established a definition of navigability that attempts to unify prior definitions

51. The Montello, 87 U.S. (11 Wall.) 430, 441–42 (1874).

52. *Utah v. United States*, 403 U.S. at 10 (citing United States v. Utah, 283 U.S. 64, 75 (1931); *United States v. Oregon*, 295 U.S. at 14).

53. *United States v. Utah*, 283 U.S. at 89.

54. *Id.* at 74. Given the last point, the Utah legislature's declaration that the three rivers were navigable was of no binding effect. *Id.* at 75 n.6.

from *The Daniel Ball*, *The Montello*, and *Holt State Bank*.[55] After reviewing previous holdings on navigability, the *Utah* Court explained that:

> The extent of existing commerce is not the test. The evidence of actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.[56]

As a result, the presence of sandbars that occasionally impeded navigation did not make the three rivers non-navigable because the rivers were still generally susceptible to use as channels of commerce.[57]

Four years later, applying the same test, the Supreme Court determined that Lake Malheur, Mud Lake, Harney Lake, the Narrows, and Sand Reef in Oregon were *not* navigable. According to the Court's findings:

> Neither trade nor travel did then [at statehood] or at any time since has or could or can move over said Divisions, or any of them, in their natural and or ordinary conditions according to the customary modes of trade and travel over water; nor was any of them on February 14, 1859 [Oregon's date of statehood] nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce.[58]

In contrast, under the same consolidated federal test, the Great Salt Lake *was* navigable, and its beds owned by Utah, because of its use as a channel of commerce, despite its not being part of an interstate or international network.[59]

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55. United States v. Holt State Bank, 270 U.S. 49 (1926). In *Holt State Bank*, the U.S. Supreme Court determined the navigability of Mud Lake in Minnesota. After emphasizing that the lower courts erred in using a local state standard of navigability instead of a federal standard, *id.* at 55, the Court applied the federal navigability test from *The Montello*. Specifically, the Court stated that:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats-nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

Id. at 56 (citing The Montello, 87 U.S. at 439).

56. *Unites States v. Utah*, 283 U.S. at 82.

57. *Id.* at 86.

58. *United States v. Oregon*, 295 U.S. at 15 (citing *Holt State Bank*, 270 U.S. at 56; *United States v. Utah*, 283 U.S. at 76; Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922); Oklahoma v. Texas, 258 U.S. 574, 586 (1922); Econ. Light & Power Co. v. United States, 256 U.S. 113, 122–23 (1921); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).

59. Utah v. United States, 403 U.S. 9, 10–11 (1971).

3. Exceptions to State Title in the Western States

Although the presumption is that western states received title to the beds and banks of the navigable rivers within their borders, most western states existed as federal territories for some time before achieving statehood. As a result, state title in the West, far more than in the East, is subject to prior federal conveyances and reservations of title to navigable waters.

For example, when the federal government reserved navigable waters to some federal purpose before the date of statehood (or unappropriated waters even after statehood), those navigable waters remain in federal ownership. Many such reservations in the West benefit Indian tribes. For example, the Cherokee, Chickasaw, and Choctaw Nations own the bed under portions of the Arkansas River in Oklahoma,[60] and the Osage Tribe owns the lands beneath the Arkansas River flowing along the Osage Indian Reservation.[61] Similarly, the United States holds title to Coeur d'Alene Lake and the St. Joe River in Idaho in trust for the Coeur d'Alene Tribe.[62]

Other reservations, however, serve other federal purposes. Thus, the State of Alaska did not receive title to any of the submerged lands within the boundary of the National Petroleum Reserve or the Arctic National Wildlife Refuge.[63]

In addition, the federal government retains title to lands under some waters, especially coastal waters, as an aspect of its fundamental sovereignty. For example, Alaska does not have title to the submerged lands in the lower inlet of Cook Inlet because the state could not show a sufficient exercise of sovereignty historically to make these waters a "historic bay," leaving title to the inlet in the federal government.[64]

Finally, federal patents granted to private individuals before the date of statehood can affect both a state's title to submerged lands and the application of the state's public trust doctrine. For example, the U.S. Supreme Court has made clear that California cannot enforce any public trust easement over tidelands that the federal government conveyed to private individuals pursuant to the Act of 1851 if the federal patent makes no mention of a public easement.[65]

60. Chocktaw Nation v. Oklahoma, 397 U.S. 620, 630–32 (1970); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 701 (1987).

61. *Brewer-Elliott Oil & Gas Co.*, 260 U.S. at 86–87.

62. Idaho v. United States, 533 U.S. 262, 272 (2001).

63. United States v. Alaska, 521 U.S. 1, 36–46 (1997).

64. United States v. Alaska, 422 U.S. 184, 200–04 (1975).

65. Summa Corp. v. Cal. *ex rel.* State Lands Comm'n, 466 U.S. 198, 205–09 (1984).

4. Superiority of the Federal Interest in Navigation

Despite state ownership of the beds and banks of navigable waters, the federal government retains a paramount interest in maintaining navigation in the navigable waters. This interest is one of the most basic manifestations of the federal government's Commerce Clause powers, but it can also serve to reinforce the public values in navigable waters protected by the public trust doctrine.

One aspect of this paramount federal navigation interest is the federal navigation servitude. The main import of the federal navigation servitude is that government actions to maintain navigation do not require the government to compensate private persons and entities for injuries to private property rights.[66] For example, as early as 1829 the U.S. Supreme Court noted that

> [l]aws in relation to roads, bridges, rivers and other public highways, which do not take away private rights to property, may be passed at the discretion of the legislature, however much they may effect common rights; even private rights, if they are not those of property, may be taken away, if it be deemed necessary consequence of their construction, without making compensation.[67]

Thus, with respect to navigation, public values can intrude upon private.

Another aspect of the navigation interest is the federal government's continuing right to regulate interstate commerce. This right, while distinguishable from regulating navigation per se, nevertheless has substantial overlaps with navigation concerns.[68] Moreover, under the Supremacy Clause,[69] Congress's regulation of interstate commerce in navigable waters will trump any conflicting state regulation.[70]

Finally, in the context of water law, the federal government's paramount interest in navigation may, in extreme cases, limit the rights of western appropriators to destroy public values in any waters that become navigable, even if they are not so at the point of diversion. In an 1899 case, the U.S. Supreme Court addressed the propriety of the complete diversion of the Rio Grande River in New Mexico, where it is not navigable. The Court concluded

66. Gibson v. United States, 166 U.S. 269, 271–76 (1897); Scranton v. Wheeler, 179 U.S. 141, 156–58, 163–65 (1900).

67. Wilson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 252 n.1 (1829).

68. Gibbons v. Ogden, 22 U.S. 1, 11–20, 64–69, 71–79 (1824).

69. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., art. VI, cl. 2.

70. *Gibbons v. Ogden*, 22 U.S. at 71–79, 89–96.

that such upstream diversions could not interfere with the federal government's downstream interest in maintaining navigability, for two reasons:

> First, . . . in the absence of specific authority from [C]ongress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, . . . it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any state action.[71]

The Court has reaffirmed these potential limitations on the destruction of downstream navigability in subsequent cases.[72]

B. The Supreme Court's Delineation of an American Public Trust Doctrine and the Limitations the Doctrine Imposes on States[73]

The U.S. Supreme Court most clearly announced the existence of a public trust doctrine in American law in *Illinois Central Railroad Co. v. Illinois*.[74] According to that decision, a state holds title to submerged lands,

> [b]ut it is a title different in character from that which the state holds in lands intended for sale . . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.[75]

Thus, the three public uses of waters that a public trust doctrine generally protects are navigation, commerce, and fishing.[76]

In addition, according to the *Illinois Central Railroad* Court, the doctrine acts as a restraint on the state's ability to alienate the beds and banks of

71. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

72. *See, e.g.*, Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 159–60 (1935).

73. As discussed *supra*, the extent to which the U.S. Supreme Court based some of these limitations—especially the restraint on alienation—on federal law that could preempt state law is highly debatable. As a result, states vary in how "binding" they consider the Court's articulations of public trust doctrine restraints, although most have followed *Illinois Central Railroad*'s restrictions.

74. 146 U.S. 387 (1892). For discussions of the history of this case and its relationship to state public trust doctrines, see generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004); Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849 (2001); Eric Pearson, Illinois Central *and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713 (1996).

75. *Ill. Cent. R.R.*, 146 U.S. at 453.

76. *Id.*; *see also* Shively v. Bowlby, 152 U.S. 1, 13 (1894) (emphasizing the public rights of fishing and navigation).

navigable waters or to abdicate regulatory control over those waters. The Court described the trust as essentially prohibiting a state from abdicating its general control over lands under navigable waters, such as by granting very large parcels to development interests: "The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[77] This restraint on alienation—and its perception as a federal law requirement—has been important in several western states, notably Arizona.[78]

C. *A Note on Federal Law, Prior Appropriation, and Non-Navigable Waters in the West*

Both the U.S. Supreme Court and Congress have recognized that western states adopted prior appropriation as their dominant water law. In the Act of July 26, 1866, Congress began to formally recognize prior appropriation's ascendancy over riparian rights in the West.[79] In the Desert Land Act of 1877,[80] as interpreted by the Supreme Court, it both subjected non-navigable waters to prior appropriation and gave western states control over those waters.

The Desert Land Act applies to lands in California, Oregon, Nevada, Colorado, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North Dakota, and South Dakota that were public at the time of enactment.[81] In other words, it applies to all states discussed in this Article except Nebraska, Kansas, Oklahoma, Texas, Hawai'i, and Alaska. In the Act, Congress recognized that reclamation, large-scale development, and movement of fresh water would be necessary in order to settle the arid western lands.[82] As a result, according to the Supreme Court, Congress both severed non-navigable waters from the public lands, ending common-law riparian rights,[83] and gave control over water rights in those waters to the states.[84]

Thus, through the Desert Land Act and statutes like it, Congress allowed western states to assert ownership and control over non-navigable waters as well as navigable, even though the states did not own the beds and banks

77. *Ill. Cent. R.R.*, 146 U.S. at 452–53.

78. *See, e.g.*, Defenders of Wildlife v. Hull, 18 P.3d 722, 726–28 (Ariz. App. 2001) (relying on *Illinois Central Railroad* to conclude that the restraint on alienation of submerged lands is a common-law rule grounded in the Constitution that invalidates the Arizona legislature's attempts to disclaim or restrict state ownership of those lands).

79. Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 251.

80. 43 U.S.C. § 321 (2008).

81. Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 165 (1935).

82. *Id.* at 157–58.

83. *Id.*

84. *Id.* at 163–64; *see also* Cappaert v. United States, 426 U.S. 128, 139 n.5 (1976); Nebraska v. Wyoming, 325 U.S. 589, 612 (1945); Ickes v. Fox, 300 U.S. 82, 95–96 (1937) (all confirming the import of the Desert Land Act).

beneath those waters. As will be discussed in more detail, this ability to declare state ownership of all water has been an important component of many western states' public trust doctrines.

III. WESTERN STATES' PUBLIC TRUST DOCTRINES: TRENDS AND APPROACHES TO PUBLIC RIGHTS IN WATER

In the western states, the Illinois Central Railroad Court's pronouncements regarding the public trust doctrine have generally been interpreted as defining the doctrine's minimal applicability in terms of waters covered, uses protected, and restraints on state authority to eliminate the public trust. The courts in several western states—especially Arizona, Colorado, Idaho, Kansas, and Nebraska—have largely adhered to this "minimalist" public trust doctrine, while Nevada courts simply lack sufficient public trust statutes to have effected any state-law expansions of the doctrine.

The other thirteen western states, however, have added important state-law dimensions to the scope of the public trust doctrine as it operates within their respective borders. These states have used a variety of legal techniques to protect and expand public rights in the waters of each state: redefining "navigable" waters for state law purposes; expanding the list of protected public uses beyond navigation, fishing, and commerce; and extending public rights and public trust principles to all state waters, regardless of who owns the beds and banks.

More recently, several states have extended the concept of a public trust in waters to environmental protection—what this Article refers to as the "ecological public trust." California and Hawai'i have most extensively developed their ecological public trust doctrines, but nascent ecological public trusts are detectable in several other western states as well.

In addition, as a result of the variety of elements on which state law might operate—the definition of "navigable," the uses protected, extensions to all water, and/or inclusion of ecological considerations—the western states' public trust doctrines have become highly individualistic. Thus, the import of public trust principles is now largely a matter of state common law, sometimes supplemented by state statutes, rather than any kind of straightforward application of the U.S. Supreme Court's statements from Illinois Central *Railroad.*

A. Adaptations of the Public Trust Doctrines to Particular State Circumstances and Public Policies

Courts and, to a lesser extent, legislatures in western states often clearly connect the state's public trust doctrine to larger issues of state public policy. In states where these larger public policies include recognition of actual or potential loss of the public values of fresh water, more robust public trust

doctrines are often the result. In contrast, in states where public policies favor private rights, more restricted public trust doctrines have been the norm.

Arizona, for example, is an example of the latter kind of state—so much so that legislative attempts to restrict the state's public trust doctrine have prompted repeated interventions by the Arizona courts.[85] By statute, Arizona limits "navigable waters"—and its public trust doctrine—to those waters subject to the federal equal footing doctrine.[86] In contrast, Hawai'i courts are acutely aware of the scarcity of fresh water in the state and have subordinated private water rights to the public interest in preserving the state's "natural bounty."[87]

States that seek to preserve the public interest in waters have used a variety of legal techniques for doing so. For example, the North Dakota Supreme Court adapted the state's law regarding shifting rivers to protect the public rights in those rivers:

> The Territorial Legislative Assembly recognized that our state would receive title to the beds of navigable waters at statehood. Accordingly, by 1877, it had enacted a code that would secure title of the state to such lands and modify common law so that the state's title would follow the movement of the bed of the river. This accords with underlying public policy, since the purpose of a state holding title to a navigable riverbed is to foster the public's right of navigation, traditionally the most important feature of the public trust doctrine. Moreover, it seems to use that other important aspects of the state's public interest, such as bathing, swimming, recreation, and fishing, as well as irrigation, industrial and other water supplies, are most closely associated with where the water is in the new riverbed, not the old.[88]

To address a different threat to public rights in waters, the Oklahoma Supreme Court has distinguished navigability for title purposes from navigability for public use purposes. Using a pleasure boat test of navigability, it protects its smaller rivers and the recreational and aesthetic amenities that

85. Defenders of Wildlife v. Hull, 18 P.3d 722, 727 (Ariz. App. 2001); San Carlos Apache Tribe v. Superior Court *ex rel.* County of Maricopa, 972 P.2d 179, 199 (Ariz. 1999); Calmat of Ariz. v. State *ex rel.* Miller, 836 P.2d 1010, 1020–21 (Ariz. App. 1992); Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 162–73 (Ariz. App. 1991).

86. As such, a "navigable watercourse" for purposes of both state title and the application of the public trust doctrine is

> a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

ARIZ. REV. STAT. § 37-1130(5) (LexisNexis 2009). "Public trust lands" are limited to the beds of these navigable watercourses. *Id.* § 37-1130(8).

87. Robinson v. Ariyoshi, 658 P.2d 287, 311–12 (Haw. 1982).

88. J.P. Furlong Enters., Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130, 140 (N.D. 1988).

they provide. It found, for instance, "that the Kiamichi River is one of the beautiful streams of southeastern Oklahoma that has for many years been known as one of the best fishing streams in the State and used by the public for fishing, recreation, and pleasure" and extended legal protections to those public uses and values.[89]

More extensively, courts in California have explicitly and repeatedly emphasized that lands beneath nontidal navigable waters "constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state."[90] Moreover, the California Supreme Court considers the public trust doctrine to be adaptable and evolving, noting that "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."[91] It recognizes that the trust traditionally protects navigation, commerce, and fishing, but also has expansively announced that public trust rights "have been held to include the right to fish, hunt, bathe, swim, to use for boating, and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[92]

The Texas courts, similarly, have noted that "[t]he purpose of the State maintaining title to the beds and waters of all navigable bodies is to protect the public's interest in those scarce natural resources."[93] As such, "the State, as trustee, is entitled to regulate those waters and submerged lands to protect its citizens' health and safety and to conserve natural resources."[94]

Oregon has used a variety of legal mechanisms to acknowledge and protect the public interests in tidal and navigable-in-fact waters. Like in California, the Oregon courts view the state's waters as a limited and precious resource:

> The severe restriction on the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands, but upon the exhaustible and irreplaceable nature of

89. Curry v. Hill, 460 P.2d 933, 935 (Okla. 1969).

90. State v. Superior Court (Lyons), 625 P.2d 239, 242 (Cal. 1981).

91. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983) (citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)); *see also* Pers. Watercraft Coal. v. Marin County Bd. of Supervisors, 122 Cal. Rptr. 2d 425, 437 (Cal. Ct. App. 2002) (repeating that the doctrine is "sufficiently flexible to encompass changing public needs" (citations omitted)).

92. *Marks*, 491 P.2d at 379–80 (Cal. 1971); *see also* City of Berkeley v. Superior Court, 606 P.2d 362, 365 (Cal. 1980); Graf v. San Diego Unified Port Dist., 7 Cal. App. 4th 1224, 1228–29 (Cal. Ct. App. 1992).

93. Cummins v. Travis County Water Control & Improvement Dist. No. 17, 175 S.W.2d 34, 49 (Tex. App. 2005).

94. *Id.* (citing Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942)); *see also* Carruthers v. Terramar Beach Cmty. Improvement Ass'n, Inc., 645 S.W.2d 772, 774 (Tex. 1983) ("The waters of public navigable streams are held by the State in trust for the public, primarily for navigation purposes." (citing Motl v. Boyd, 286 S.W. 458 (Tex. 1926))).

> the resources and its fundamental importance to our society and our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.[95]

Thus, in applying the public trust doctrine, the Oregon courts have noted that "lands underlying navigable waters have been recognized as unique and limited resources and have been accorded special protection to insure their preservation for public water-related uses such as navigation, fishery and recreation."[96] As a result, "[u]nder the common law public trust doctrine, the public use of such waters could not be substantially modified except for water-related purposes."[97]

Moreover, like Oklahoma,[98] Oregon has refined its definition of navigability to reflect the physical realities and public policy priorities of the state. Thus, Oregon early on adopted a log floatation test for navigability because that rule

> best accords with common sense and public convenience, for these rapid streams, penetrating deep into the mountains, are the only means by which timber can be brought from these rugged sections, without great labor and expense; and by their use large tracks of timber, otherwise too remote or difficult of access, can be rendered of great value, as the country shall grow and timber become scarce.[99]

Finally, unusually (but not uniquely)[100] among states, Oregon has employed the doctrine of custom to ensure public access to dry sand beaches not protected by the public trust doctrine.[101] As a result, the Oregon Supreme Court concluded that no taking of private property had occurred when the state denied landowners permits to build sea walls.[102]

Other states have also used some of these mechanisms to adapt the public trust doctrine to the particular public interests and policies of that state. For example, by statute, and for purposes of establishing public rights in waters, Alaska defines a "navigable water" to be:

95. Morse v. Or. Div. of State Lands, 581 P.2d 520, 524 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 709 (Or. 1979).

96. *Id.* at 523.

97. *Id.*

98. *See supra* note 89 and accompanying text.

99. Felger v. Robinson, 3 Or. 455, 458 (1869).

100. Because the public has long used the beaches of Hawai'i, that use "has ripened into a customary right. Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." Hawaii County v. Sotomura, 517 P.2d 57, 61–62 (Haw. 1973) (citing Oregon *ex rel.* Thorton v. Hay, 462 P.2d 671 (Or. 1969)).

101. *Oregon* ex rel. *Thornton*, 462 P.2d at 673–78.

102. Stevens v. City of Cannon Beach, 854 P.2d 449, 451 (Or. 1993).

> any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes . . . .[103]

The public also has rights in "public waters," which by statute include not only navigable waters, but also "all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest . . . ."[104] These definitions and public rights protections reflect Alaska's unique environmental and cultural circumstances. Alaska, for example, is the only western state that explicitly identifies use of waters by seaplanes as an important public use to be protected by law. In addition, Alaska is a prime fishing state, and its statutory declarations of what constitute public waters give special consideration to the use of waters not just for fishing but also for spawning and migration, reflecting most obviously the peculiarities of salmon life cycles; salmon in Alaska are important to commercial fishermen, recreational fishers and the recreation industry, and Native Alaskans.[105] The public trust doctrines of Oregon[106] and Washington[107] similarly reflect the importance of salmon and shellfish, respectively, to those states' citizens.

103. ALASKA STAT. ANN. § 38.05.965(13) (2004).

104. *Id.* § 38.05.965(18).

105. Timothy J. Mullins, *The Clean Water Initiatives and the Proper Balance Between the Right to Ballot Initiatives and the Prohibition on Appropriations*, 26 ALASKA L. REV. 135, 141, 168 (2009); Katy Hansen, Rebecca Vernon, & Hana Bae, *Supreme Court Preview*, 56 FED. LAWYER 62, 62–63 (2009).

106. For example, Oregon's public trust responsibilities have been applied to fishing regulation. As a result, statutes purporting to convey exclusive rights to fish in navigable waters violated the Privileges and Immunities Clause in the Oregon Constitution. Hume v. Rogue River Packing Co., 92 P. 1065, 1072–73 (Or. 1907); *see also* Johnson v. Hoy, 47 P.2d 252, 252 (Or. 1935) (holding that the Legislature cannot grant an exclusive right to fish for salmon). Nevertheless, because the state has jurisdiction over navigable waters, it can regulate fishing. Oregon v. Nielsen, 95 P. 720, 722 (Or. 1908); Antony v. Veatch, 220 P.2d 493, 498–99 (Or. 1950). Specifically, fishing methods can be enjoined if they interfere with the public's common right of fishing. Radich v. Frederckson, 10 P.2d 352, 355 (Or. 1932); *Johnson*, 47 P.2d at 252.

107. "[I]n Washington, the public trust doctrine does not encompass the right to gather clams on private property" because shellfish rights follow title to the submerged lands. Washington v. Longshore, 982 P.2d 1191, 1195–96 (Wash. App. 1999), *aff'd*, 5 P.3d 1256, 1259–63 (Wash. 2000) (en banc); *see also* Wash. State Geoduck Harvest Ass'n v. Wash. State Dept. of Natural Res., 101 P.3d 891, 895 (Wash. App. 2004) (noting that shellfish are not typical wildlife in Washington because they are considered part of the land). However, state regulation of geoducks does not violate the public trust doctrine. *Id.*

B. *Public Ownership of Submerged Lands, Public Ownership of Water, and Public Rights in Water*

As discussed above, the U.S. Supreme Court has most explicitly connected public trust rights to navigable waters—that is, the waters in which the state owns the beds and banks. Thus, in what might be called the state-property-based view of public trust doctrines, public rights follow state title to submerged *lands*.

However, in the West, as noted, federal and state law both allow for—and most states have declared[108]—state or public ownership of the fresh waters themselves, independent of ownership of submerged lands. This public aquatic property right provides these states with another property law basis upon which to recognize and expand public rights in water beyond those recognized in traditional concepts of the public trust doctrine, as articulated in *Illinois Central Railroad*. Thus, as was true for the eastern states,[109] most western states have divorced public rights in waters from state or public ownership of the relevant submerged lands, although the western states generally rely on different legal mechanisms—such as state ownership of water—to do so.

Among the western states, Colorado and Idaho have most clearly adhered to the strict and limited traditional view of public rights in their public trust doctrines. Relying on the federal test of navigability, the Colorado Supreme Court has declared almost all streams in Colorado to be non-navigable: "the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and . . . no stream of any importance whose source is without those boundaries, flows into or through this state."[110] It then explicitly refused to follow the "modern trend" and allow public rights in non-navigable rivers based on state ownership of the water itself, concluding that the Colorado Constitution does *not* preserve public recreation rights in such waters.[111] Instead, "[w]ithout permission, the public cannot use such waters for recreation."[112]

108. ALASKA CONST., art. VIII, § 13; ALASKA STAT. § 46.15.030 (2009); ARIZ. REV. STAT. § 45-141(A) (LexisNexis 2009); CAL. WATER CODE § 1201 (2009); COLO. CONST., art. XVI, § 5; HAW. CONST., art. XI, §§ 1, 7; KAN. STAT. ANN. § 82a-702 (2009); MONT. CONST., art. IX, § 3(3); NEB. CONST., art. XV, § 5; NEV. REV. STAT. § 533.025 (2008); N.M. CONST., art. XVI, § 2; N.M. STAT. § 72-1-1 (2009); N.D. CONST., art. XI, § 3; N.D. CENT. CODE § 61-01-01 (2009); OR. REV. STAT. §§ 537.010, 537.525 (2009); S.D. CODIFIED LAWS § 46-1-3 (2009); TEX. WATER CODE ANN. § 11.021(a) (Vernon 2009); UTAH CODE ANN. § 73-1-1 (2009); WASH. REV. CODE § 90.03.010 (2009); WYO. STAT. ANN. § 41-3-115(a) (2009).

109. Craig, *supra* note 6, at 14–16.

110. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds*, Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200 (Colo. 1975); *see also* United States v. Dist. Court, 458 P.2d 760, 762 (Colo. 1969) (holding that even though the Eagle River is a tributary of the Colorado River, it is non-navigable).

111. People v. Emmert, 597 P.2d 1025, 1027–28 (Colo. 1979).

112. *Id.* at 1029; *see also* Hartman v. Tresise, 84 P. 685, 686–87 (Colo. 1905) (holding that public ownership of the water itself, as stated in the Colorado Constitution, does *not* create a public fishery in

In contrast, the Idaho courts until 1996 were following the western "modern trend," indicating that water and "proprietary rights to use water . . . are held subject to the public trust."[113] In 1996, however, Idaho's legislature invalidated this line of cases, instead defining (and confining) the state's public trust doctrine by statute.[114] These provisions declare that

> [t]he public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters as defined in this chapter . . . . The public trust doctrine shall not be applied to any purpose other than as provided in this chapter, [especially not to' [t]he appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights . . . or any other procedure or law applicable to water rights in the state of Idaho [or to] [t]he protection or exercise of private property rights within the state of Idaho.[115]

Most other western states, however, have followed the "modern trend" that the Colorado Supreme Court rejected. For example, according to the Montana Supreme Court, "[t]he public trust doctrine in Montana's Constitution grants public ownership in *water* not in beds and banks of streams," and "*[a]ll* waters are owned by the State for the use of its people."[116] As a result, "the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water," even if the bed and banks are privately owned.[117] Nevertheless,

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non-navigable streams; instead, the private landowner owns the right of fishery, and only appropriative rights can trump this common-law rule). Kansas takes the same approach:

> Owners of the bed of a nonnavigable stream have the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions, and regulations. Where the legislature refuses to create a public trust for recreational purposes in non-navigable streams, courts should not alter the legislature's statement of public policy by judicial legislation.

State *ex rel.* Meek v. Hays, 785 P.2d 1350, 1364–65 (Kan. 1990). As a result, "[t]he public has no right to the use of nonnavigable water overlying private lands for recreational purposes without the consent of the landowner." *Id.* at 1365.

113. Idaho Conservation League, Inc. v. Idaho, 911 P.2d 748, 750 (Idaho 1995); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983) (holding that "the public trust doctrine takes precedence even over vested water rights.").

114. IDAHO CODE §§ 58-1201 to 58-1203 (1996).

115. *Id.* §§ 58-1203(1), (2)(b), (c). These statutes define "navigable waters" as "those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability" and identify the line of "natural or ordinary high water mark" as the boundary of the beds of navigable waters, in complete agreement with federal law. *Id.* § 58-1202(1).

116. Galt v. Montana, 731 P.2d 912, 915 (Mont. 1987) (emphasis added).

117. *Id.*; Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1092 (Mont. 1984) (noting that underlying ownership of the bed does not matter for the public's recreational use right); Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) (holding that "under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.").

Montana statutes make it clear that appropriated water rights trump any other public interest in the waters, including environmental protections and public use rights.[118]

New Mexico and North Dakota, similarly, have found constitutional and statutory declarations that waters are publicly owned relevant to their public trust doctrines. Thus, in 1947, the New Mexico Supreme Court declared that all waters are public waters until beneficially appropriated and that the public can thus use all waters for outside recreation, sports, and fishing.[119] In 1976, North Dakota declared that the public trust doctrine extends broadly to management of the state's water resources, requiring the State Engineer to determine "the potential effect of [a proposed] allocation of water on the present water supply and future needs of this State," necessitating water resources planning.[120]

More recently, the South Dakota Supreme Court decided to follow "modern trend" decisions in Idaho (now overruled by statute), Montana, New Mexico, Wyoming, Minnesota, North Dakota, and Iowa to open all waters in the state to public use.[121] As a result, the South Dakota Water Resources Act, which governs allocation of appropriative water rights in the state, must now work in tandem with the public trust doctrine:

> [W]hile we regard the public trust doctrine and Water Resources Act as having shared principles, the Act does not supplant the scope of the public trust doctrine. The Water Resources Act evinces a legislative intent both to allocate and regulate water resources. In part, this Act codifies public trust principles. The first three sections of the Act embody the core principles of the public trust doctrine—"the people of the state have a paramount interest in the use of all the water of the state," SDCL 46-1-1; "the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit," SDCL 46-1-2; and "all water within the state is the property of the people of the state." SDCL 46-1-3.[122]

Moreover, when increased precipitation creates new lakes on private property, "the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public," and the public trust doctrine applies independently of bed ownership.[123] In summary, "all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public."[124]

118. MONT. CODE ANN. §§ 75-5-705, 75-7-104, 85-1-111 (2009).

119. State *ex rel.* State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 429–32 (N.M. 1947).

120. United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 461, 463 (N.D. 1976).

121. Parks v. Cooper, 676 N.W.2d 823, 833–36 (S.D. 2004).

122. *Id.* at 838.

123. *Id.*

124. *Id.* at 838–39.

Under Utah's statutes, waters are owned by the public,[125] and the Utah Supreme Court has tied the need for public rights to water scarcity: water is "a scarce and essential resource in this area of the country" that "is indispensable to the welfare of all people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole."[126] Thus:

> Under this "doctrine of public ownership," the public owns state waters and has "an easement over the water regardless of who owns the water bed beneath." In granting this public this easement, "state policy recognizes an interest of the public in the use of state waters for recreational purposes." This court has enumerated the specific recreational rights that are within the easement's scope. They include "the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water."[127]

Hence, bed ownership is irrelevant for the public's rights to use waters in the state.[128] Moreover, "the scope of the public's easement in state waters provides the public the right to engage in all recreational activities that *utilize* the water and does not limit the public to activities that can be performed *upon* the water."[129] As a result, "the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement."[130]

Finally, Wyoming, too, has extended public use rights to all waters based on its ownership of the water itself. According to the Wyoming Supreme Court, "the actual usability of the waters is alone the limit of the public's right to employ them."[131] Except in federally navigable waters, "the exclusive control of waters is vested in the state," and hence "[i]t follows that the state may lay down and follow such criteria for cataloguing waters as navigable or nonnavigable, as it sees fit, and the state may also decide the ownership of submerged lands, irrespective of the navigable or nonnavigable character of the waters above them."[132] As a result, state ownership of the waters themselves impresses those waters with a public trust.[133] The public can float craft down any waters so usable, regardless of bed ownership, and can scrape bottom, disembark, and pull the craft over shoals.[134] Moreover, members of the public

125. UTAH CODE ANN. § 73-1-1 (2009).
126. JJNP Co. v. Utah, 655 P.2d 1133, 1136 (Utah 1982).
127. Conater v. Johnson, 194 P.3d 897, 899–900 (Utah 2008) (quoting *JJNP Co.*, 655 P.2d at 1137).
128. *Id.*
129. *Id.* at 901.
130. *Id.* at 901–02 (limiting criminal trespass liability for water users).
131. Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961).
132. *Id.* at 143.
133. *Id.* at 145.
134. *Id.* at 145–46.

can hunt or fish while floating.[135] However, public use rights do not give the public the right to wade or walk on privately owned streambeds.[136]

C. The Emergence of Ecological Public Trust Doctrines in the West

As in eastern states,[137] most western states have expanded the protected public rights in waters beyond the three acknowledged in *Illinois Central Railroad*—navigation, fishing, and commerce—to recreation and other public uses, including, in some states, aesthetics.[138] Only Arizona (by statute)[139] and Colorado (by case law[140]) have intentionally limited public rights in waters,

135. *Id.* at 147.

136. *Id.* at 146.

137. Craig, *supra* note 6, at 17–19.

138. *See, e.g.*, ALASKA STAT. ANN. § 38.05.965(13) (2004) (defining "navigable waters" to include waters that are usable for "floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes"); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (noting that public trust rights "have been held to include the right to fish, hunt, bathe, swim, to use for boating, and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes"); In re Water Use Permit Applications, 9 P.3d 409, 448 (Haw. 2000) (recognizing broad public rights in its waters, noting that "the trust has traditionally preserved public rights of navigation, commerce, and fishing" but also mentioning "a wide range of recreational uses, including bathing, swimming, boating, and scenic viewing, as protected trust purposes"); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1092 (Idaho 1983) (acknowledging recreation as a public trust right); Kansas v. Akers, 140 P. 637, 640 (Kan. 1914) (protecting "the purposes for which [submerged land] has been used from time immemorial, viz; the common right of passage, of fishing, of the use of the waters for domestic, agricultural, and commercial purposes"); MONT. CODE ANN. §§ 23-2-301 to 23-2-322, 85-1-111, 85-1-112, 85-16-102, 87-2-305 (2009) (codifying public rights of recreation, fishing, and navigation); New Mexico *ex rel.* State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 429–32 (N.M. 1947) (recognizing public rights of recreation, sports, and fishing); J.P. Furlong Enters., Inc. v. Sun Exploration & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988) (recognizing bathing, swimming, fishing, and irrigation as protected public interests); Curry v. Hill, 460 P.2d 933, 935–36 (Okla. 1969) (acknowledging that the public can have rights of boating, recreation, and fishing in waters that are not navigable under the federal title test); Morse v. Or. Div. of State Lands, 581 P.2d 520, 523 (Or. App. 1978), *aff'd*, 590 P.2d 709 (Or. 1979) (noting that public trust rights extend to recreation); Hillebrand v. Knapp, 274 N.W. 821, 822 (1937) (listing sailing, rowing, fishing, fowling, bathing, skating, taking water, and cutting ice as public uses); Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Texas 1935) (noting that public rights include hunting, fishing, navigation, "and other lawful purposes"); JJNP Co. v. Utah, 655 P.2d 1133, 1137 (Utah 1982) (noting that public rights include "the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water"); Wilbour v. Gallagher, 462 P.2d 232, 239 & n.7 (Wash. 1969) (holding that in navigable waters, the public has rights of navigation, "fishing, boating, swimming, water skiing, and other related recreational" rights, which probably include boating, bathing, fishing, fowling, skating, cutting ice, water skiing, and skin diving); Day v. Armstrong, 362 P.2d 137, 145–47 (Wyo. 1961) (holding that the public can float craft down any waters so usable, regardless of bed ownership, and can scrape bottom, disembark, and pull the craft over shoals and can hunt or fish while floating).

139. ARIZ. REV. STAT. § 37-1130(9) (LexisNexis 2009).

140. The Colorado Supreme Court has declared most streams in Colorado non-navigable. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds*, Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200 (Colo. 1975). In a non-navigable river, title to the bed and banks belongs to the private landowner, giving the landowner exclusive control over the water and the right to exclude recreational users who would like to use the water for floating or fishing.

although neither Nebraska nor Nevada has yet fully developed its public trust law in this respect.

Such expanded public rights, however, still remain focused on public *uses* of waters—not on the ecological and ecosystem services values of aquatic and other ecosystems. Indeed, with the emergence of pervasive statutory environmental and natural resources law in the 1970s and 1980s, both federal and state, the need for broader public trust principles to protect ecological values seemed highly questionable. Thus, Richard Lazarus concluded in 1986

> that the day of "final reckoning" for the doctrine is here, or soon will be, and reliance upon it is no longer in order . . . . [T]he law of standing, tort law, property law, administrative law, and the police power have all evolved in response to increased societal concern for and awareness of environmental and natural resources problems and are weaving a new and unified fabric for natural resources law. Whether these developments are viewed as totally independent of the doctrine or, alternatively, as somehow having subsumed the doctrine's principles does not matter. The conclusion is the same from either perspective: much of what the public trust doctrine offered in the past is now, at best, superfluous and, at worst, distracting and theoretically inconsistent with new notions of property and sovereignty developing in the current reworking of natural resources law.[141]

Nevertheless, scholars continue to assert the need for expanded public trust doctrines. For example, in 1991, Alison Rieser summarized the drive to broaden public trust concepts as follows:

> Due largely to recent decisions of the California courts, the notion that the public has a right to expect certain lands and natural areas to retain their natural characteristics is finding its way into American law. Through interpretation and expansion of the common law public trust doctrine, state courts are identifying governmental duties to redefine existing private property rights where such rights may threaten the ecological value of natural areas. Courts have subjected to this special duty primarily properties associated with navigable waters. Litigants and state agencies, however, appear poised and willing to invoke the public trust doctrine with respect to a number of other resources unrelated to navigation. Several public trust commentators—including Professor Joseph Sax, the modern doctrine's earliest and most prominent proponent—either urge or foresee a continuing expansion in the doctrine's scope. Some predict that courts will eventually apply public trust protections to all waterbodies, as well as to such diverse resources as old growth forests, mountains, and wildlife.[142]

People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979) (upholding a criminal trespass conviction for floating down a non-navigable river).

141. Lazarus, *supra* note 18, at 658.

142. Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 393–94 (1991). *See generally* Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23

More recently, Mary Christina Wood has argued for comprehensively expanded public trust concepts in American environmental and natural resources law to address emerging environmental crises and the impacts of climate change.[143]

Academic scholars' continuing revisitations of the public trust doctrine suggest that the doctrine can provide remedies to perceived shortcomings in environmental law and policy. Indeed, two drivers for these returns are discernible in the literature. First, scholars often turn to the public trust doctrine when they conclude that statutory law has not, in fact, been sufficient to protect the full gamut of public interests in the environment.[144] For example, in light of the acknowledged weaknesses in U.S. ocean and coastal law,[145] scholars with interests in these areas have repeatedly suggested the public trust doctrine as a means of better protecting coastal and marine resources.[146] Similarly, the public trust doctrine has been of interest to scholars promoting the relatively new—and hence statutorily slighted—conception of ecosystem services,

(2000); Gary D. Meyers, *Variations on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 728–35 (1989).

143. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Pardigm Shift*, 39 ENVTL. L. 43, 43–45, 65–84 (2009).

144. "Under the system of environmental statutory laws enacted in the United States over the past three decades, agencies at every jurisdictional level have gained nearly unlimited authority to manage natural resources and allow their destruction by private interests through permit systems." *Id.* at 44; *see also id.* at 54–61 (discussing the failed paradigm of environmental law).

145. *See, e.g.*, U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (2004); PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE (May 2003).

146. *See, e.g.*, Madeleine Reed, *Seawalls and the Public Trust: Navigating the Tension between Private Property and Public Beach Use in the Face of Shoreline Erosion*, 20 FORDHAM ENVTL. L. REV. 305 (2009); Turnipseed et al., *supra* note 24, at 1; F. Patrick Hubbard, *The Impact of* Lucas *on Coastal Development: Background Principles, The Public Trust Doctrine, and Global Warming*, 16 SE. ENVTL. L.J. 65 (2007); Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENVTL. L.J. 3 (2007); Kevin J. Lynch, Note, *Application of the Public Trust Doctrine to Modern Fishery Management Regimes*, 15 N.Y.U. ENVTL. L.J. 285 (2007); Ewa M. Davison, Note, *Enjoys Long Walks on the Beach: Washington's Public Trust Doctrine and the Right of Pedestrian Passage Over Private Tidelands*, 81 WASH. L. REV. 813 (2006); Kim Diana Connolly, *Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources*, 15 SE. ENVTL. L.J. 1 (2006); J.C. Sylvan, *How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea*, 7 SUSTAINABLE DEV. L. & POL'Y 32 (2006); Kristen M. Fletcher, *Regional Ocean Governance: The Role of the Public Trust Doctrine*, 16 DUKE ENVTL. L. & POL'Y F. 187 (2006); Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENVTL. L. & LITIG. 317 (2006); Monserrat Gorina-Yserri, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645 (2004); Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427 (2004); Robin Kundis Craig, *Mobil Oil Exploration, Environmental Protection, and Contract Repudiation: It's Time to Recognize the Public Trust in the Outer Continental Shelf*, 30 Envtl. L. Rep. (Envtl. Law Inst.) 11,104 (2000).

acknowledging that ecosystems provide economically valuable services to human beings.[147]

Second, and more importantly, the articulation of a "public trust" encapsulates a more general values system for the environment and its ecosystems—an environmental ethos, if you will—that is longer-term in focus, more comprehensive in its considerations, and more willing to preserve purely public values than regulatory law. Wood, for example, has recently argued that there is a need for a fundamental paradigm shift in environmental and natural resources law and has focused on the public trust doctrine as her model because it is "the most compelling beacon for a fundamental and rapid paradigm shift towards sustainability."[148] Moreover, the public trust doctrine provides one well-grounded legal mechanism for re-balancing private and public rights in the environment, and scholars increasingly perceive such a rebalancing to be necessary.[149] Thus, the legal recognition of a "public trust" provides both a rhetorically resonant articulation of the larger public interests in intact and functional ecosystems and a means of imposing broad duties on governments to act for the long-term preservation of ecosystems and other environmental values—what I have termed the ecological public trust.[150]

In many ways, however, the western states have anticipated these scholarly calls for the expansion of public trust concepts to the environment generally. While California is widely acknowledged to have evolved its public trust doctrine into an ecological public trust (at least when navigable waters are affected), it is not alone. Hawai'i has, if anything, an even broader ecological public trust doctrine than California, and other western states are more cautiously using public trust principles to expand the legally cognizable public values in the environment.

The emergence of these ecological public trust doctrines represents the leading edge of public trust common law. However, the ecological public trust doctrines are also highly individualistic, underscoring the need for scholars to

147. *See, e.g.*, Patrick J. Connolly, Note, *Saving Fish to Save the Bay: Public Trust Doctrine Protection for Menhaden's Foundational Ecosystem Services in the Chesapeake Bay*, 36 B.C. ENVTL. AFF. L. REV. 135 (2009); J.B. Ruhl & Salzman, *supra* note 5, at 223.

148. Wood, *supra* note 143, at 45.

149. *See, e.g.*, Wood, *supra* note 24, at 117 (arguing that "thirty years of statutory law has produced an imbalanced picture in which public property rights are simply not in the equation," but that "public trust law springs from the property realm and forces an adjustment of private property rights and expectation to protect the people's property rights in common, vital assets"); *see also* Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1158–67 (2007) (in the context of a nuisance law article, tracing the "supersizing" of private property rights and the demonization of public rights, interests, and values in the environment in law, policy, and rhetoric to argue that public and private rights have become unbalanced in American culture and law).

150. Professor Wood has called this "Nature's Trust." Wood, *supra* note 143, at 65–84. In the second of her two articles on this subject, she has discussed in detail the governmental obligations to protect natural resources that she would impose through this expanded public trust. *See* Wood, *supra* note 24, at 93–116.

acknowledge public trust doctrines in the plural and to actively discern and compare the common law evolutions of those doctrines in and among particular states.

1. California

It is no accident that Rieser tied the conception of an ecological public trust to California. In the 1971 case of *Marks v. Whitney*, the California Supreme Court announced:

> There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[151]

In connection with Lake Tahoe litigation, the court soon extended its recognition of ecological values to nontidal submerged lands as well, underscoring the human-created scarcity and fragility of these resources. It noted that "the [fresh water] shorezone has been reduced to a fraction of its original size in this state by the pressures of development. Such lands now cover less than one half of 1 percent of the state . . . ."[152] Moreover,

> The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead, and striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.[153]

Thus, the California public trust doctrine extends to "environmental . . . purposes."[154]

California courts have extended public trust concepts not just to aquatic wildlife habitat, but also to the wildlife itself,[155] creating "two distinct public trust doctrines" in the state.[156] Wildlife "are natural resources of inestimable

151. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (citations omitted).

152. California v. Superior Court (Fogerty), 625 P.2d 256, 258–59 (Cal. 1981).

153. *Id.*

154. City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 794 (Cal. 1982).

155. Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 596–98 (Cal. Ct. App. 2008) (citing Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989)).

156. According to the California Supreme Court:

> First is the common law doctrine, which involves the government's "affirmative duty to take the public trust into account in the planning and allocation of water resources . . . ." The

value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions,"[157] and those statutes generally define the contours of the public trust obligation regarding wildlife.[158] Members of the general public can sue to enforce the wildlife public trust as well as the navigable water public trust, because the public trust doctrine "places a *duty* upon the government to protect those resources."[159]

Within the navigable waters trust, moreover, public trust interests can extend California's authority and duties beyond the navigable waters. For example, "[t]he state's right to protect fish is not limited to navigable or otherwise public waters but extends to any waters where fish are habitated or accustomed to resort and through which the have the freedom of passage to and from the public fishing grounds of the state."[160] Similarly, in *National Audubon Society v. Superior Court* (the "Mono Lake case"),[161] the California Supreme Court determined that the public trust doctrine could restrict or require modifications in established water rights even in non-navigable tributaries of navigable waters. Withdrawals of water from Mono Lake's tributaries were imperiling "both the scenic beauty and the ecological values of Mono Lake . . . ."[162] As a result, the public trust doctrine required

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> second is a public trust duty derived from statute, specifically Fish and Game Code section 711.7, pertaining to fish and wildlife: "The fish and wildlife resources are held in trust for the people of the state by and through the department." There is doubtless an overlap between the two public trust doctrines – the protection of water resources is intertwined with the protection of wildlife. . . . Nonetheless, the duty of government agencies to protect wildlife is primarily statutory.

Envtl. Prot. & Information Ctr. v. Cal. Dept. of Forestry & Fire Prot., 187 P.3d 888, 926 (Cal. 2008) (quoting and citing Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983)); *see also* Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 212 (Cal. Ct. App. 1989) (establishing that Fish and Game Code § 5946 establishes a public trust rule but noting "that it does not follow from the application of the term 'public trust' to the state's interest in fisheries of non-navigable streams that all of the consequences of the public trust doctrine as applicable to navigable waters also apply to non-navigable streams. For example, the beds of non-navigable streams are not owned by the state based upon a public trust fishery interest.").

157. *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 598.

158. *Id.* at 599–600.

159. *Id.* at 600–01.

160. *Golden Feather Cmty. Ass'n*, 257 Cal. Rptr. at 840; *see also* People v. Truckee Lumber Co., 48 P. 374, 399–401 (Cal. 1897) (noting that "the right and power to protect and preserve [fish] for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law" and asserting that the state's authority to protect fish for the public is not limited to fish in navigable waters; "[t]o the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery"); *Cal. Trout*, 255 Cal. Rptr. at 212 (Cal. Ct. App. 1989) (concluding "that a public trust interest pertains to non-navigable streams which sustain a fishery").

161. 658 P.2d 709 (Cal. 1983).

162. *Id.* at 711.

modifications in the prior appropriation system.[163] Specifically, "the public trust doctrine . . . protects navigable waters from harm caused by diversion of non-navigable tributaries,"[164] and "when the public trust doctrine clashes with the rule of priority, the rule of priority must yield."[165]

Nevertheless, despite its reputation as the vanguard of the ecological public trust doctrine movement, California does limit the breadth of its doctrine. In particular, the *National Audubon* rule does not apply to water withdrawals from purely non-navigable waters in the absence of an effect on navigable waters.[166] Similarly, the California courts have declined to extend the *National Audubon* doctrine to groundwater.[167] Thus, despite having recognized a second, largely statutory, wildlife public trust doctrine, California maintains a connection between its ecological public trust doctrine and the traditional American source of public trust rights: state ownership of the beds and banks of navigable waters.

2. *Hawai'i*

Like California, Hawai'i recognizes two different public trust doctrines—in Hawaii's case, the navigable water public trust doctrine and a unique public trust growing out of Hawaii's complex history and Native Hawaiian rights, known as the water resources public trust. Both have contributed to a broad ecological public trust perspective in the state that favors public rights over private.

The Hawai'i water resources public trust doctrine has largely superseded the navigable waters public trust in the context of water rights and fresh waters. The Hawai'i Supreme Court has noted that in the Kingdom of Hawai'i, the right to water was reserved to the people for their common good in all land grants, and ownership of the water remained at all times in the people.[168] This sovereign reservation imposed a public trust on the water itself, similar to but different from the navigable waters public trust doctrine.[169]

163. *Id.* at 712, 727–28.

164. *Id.* at 721.

165. El Dorado Irrigation Dist. v. State Water Res. Control Bd., 48 Cal. Rptr. 3d 468, 490 (Cal. Ct. App. 2006).

166. Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 839 (1989).

167. Santa Teresa Citizen Action Group v. City of San Jose, 7 Cal. Rptr. 3d 868, 884 (Cal. Ct. App. 2003); Cal. Water Network v. Castaic Lake Water Agency, Civil Nos. B177978, B181463, 2006 WL 726882, at *11 (Cal. App. Dep't Super. Ct. 2006) (holding that the public trust doctrine does not apply to groundwater or non-navigable waterways, absent some impact on navigable waters).

168. In re Water Use Permit Applications, 9 P.3d 409, 441 (Haw. 2000); *see also* Robinson v. Ariyoshi, 658 P.2d 287, 310–11 (Haw. 1982).

169. *In re Water Use Permit Applications*, 9 P.3d at 441; *Robinson*, 658 P.2d at 310 (noting that this sovereign interest was more than just a police power interest; "[t]he nature of this ownership is thus akin to the title held by all states in navigable waterways").

Given the limited availability of fresh water resources in Hawai'i, reassertion of this traditional water resources trust has been deemed critical, both as against assertions of riparian rights and in light of the Hawai'i Water Code and water use permits. With respect to riparian rights:

> The reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of these waters. . . . [W]hile there indeed exist relative usufructory rights among landowners, these rights can no longer be treated as though they are absolute and exclusive interests in the waters of our state.[170]

Instead, "underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty."[171] Thus, the Hawai'i Supreme Court has clearly re-balanced public and private interests in these scarce resources in favor of the public.

With respect to the Hawai'i Water Code, "[t]he public trust in the water resources of this state, like the navigable waters trust, has its genesis in the common law. . . . The [State Water] Code does not evince any legislative intent to abolish the common law public trust doctrine. To the contrary, . . . the legislature appears to have engrafted the doctrine wholesale in the Code."[172] As a result, the Hawai'i Water Code "does not supplant the protections of the public trust doctrine," and "the public trust doctrine applies to all water resources without exception or distinction," including ground waters.[173]

As in California, Hawai'i may "revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust," in implementing its water law.[174] Moreover,

> the constitutional requirements of "protection" and "conservation," the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the "zero-sum" game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment . . .[175]

As a result, the state water agency's decisions in favor of private uses of water are subject to "higher scrutiny."[176] Finally, the state agency must consider the

170. *Robinson*, 658 P.2d at 311.
171. *Id.* at 312.
172. *In re Water Use Permit Applications*, 9 P.3d at 443 (citations omitted).
173. *Id.* at 445.
174. *Id.* at 409, 452 (citations omitted).
175. *Id.* at 454.
176. *Id.*; *see also* In re Water Use Permit Applications, 93 P.3d 643, 650, 657 (Haw. 2004) (noting that "because water is a public trust resource and the public trust is a state constitutional doctrine, this court recognizes certain qualifications to the standard of review regarding the Water Commission's decisions" and in effect imposes a burden on proposed users to justify their uses of water).

cumulative impacts of diversions and "implement reasonable measures to mitigate this impact, including the use of alternative sources."[177]

Importantly, according to the Hawai'i Supreme Court, "the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust."[178] Thus, this public trust doctrine encompasses ecological protection and preservation. To underscore that point, in expounding the water resources trust, the Hawai'i Supreme Court explicitly has followed the California Supreme Court's decision in *National Audubon Society*.[179]

Unlike in California, however, both of Hawaii's two water-based public trusts are incorporated into the state's much broader constitutional public trust doctrine.[180] The Hawai'i Constitution provides that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[181]

The Hawai'i Supreme Court has indicated that these more general constitutional public trust concepts extend to environmental and biodiversity protection, such as regulation of the Palila, an endangered bird.[182] In 2006, moreover, it explicitly connected the constitutionally incorporated navigable waters public trust doctrine to environmental protection when it held that the doctrine applies to the Hawai'i Department of Health's implementation of the federal Clean Water Act. Thus, when environmental groups asserted that the Department violated the public trust doctrine by failing to prevent a developer from violating state water quality standards for coastal waters, the court concluded that state issuance of National Pollutant Discharge Elimination System permits pursuant to the Clean Water Act are subject to the public trust doctrine and that the Department must ensure that water quality measures are actually being implemented.[183]

3. *Other States*

Other states besides California and Hawai'i have incorporated public trust principles into resource management and ecological conservation, although not

177. *In re Water Use Permit Applications*, 9 P.3d at 409, 455 (citations omitted).
178. *Id.* at 448.
179. *Id.* at 452 (adopting the reasoning of Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983)).
180. Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1009, 1002 (Haw. 2006).
181. HAW. CONST., art. XI, § 1.
182. Morimoto v. Bd. of Land & Natural Res., 113 P.3d 172, 184 (Haw. 2005).
183. *Kelly*, 140 P.3d at 1009, 1011.

so extensively. For example, according to the Alaska Supreme Court, "[t]he public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use and that government owes a fiduciary duty to maintain such resources for the common good of the public as beneficiary."[184] Moreover, while that court has made it clear that the navigable waters public trust doctrine per se does not extend to wildlife management, the state does have a duty under the Alaska Constitution to manage fish, wildlife, and water resources for the people's benefit, "to guarantee the common citizen participation in wildlife harvest, and to divest the [government] of exclusive entitlement to those resources."[185] Thus, according to the Alaska Supreme Court:

> We have frequently compared the state's duties as set forth in Article VIII to a trust-like relationship in which the state holds natural resources such as fish, wildlife, and water in "trust" for the benefit of all Alaskans. Instead of recognizing the creation of a public trust in these clauses *per se*, we have noted that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state."[186]

Nevertheless, in general, the State of Alaska cannot be liable in damages under the public trust doctrine for allowing the destruction of natural resources, such as when beetles destroy trees.[187]

There are also indications from the Texas courts that fish and other aquatic life are subject to public trust principles. As far back as 1942, the Texas Civil Court of Appeals declared:

> The waters of all natural streams of this State and all fish and other aquatic life contained in fresh water rivers, creeks, stream, and lakes or sloughs subject to overflow from rivers or other streams within the borders of this State, are declared to be the property of the State; and the Game, Fish and Oyster Commission has jurisdiction over and control over such rivers and aquatic life. The ownership is in trust for the people . . . , and pollution of streams and water courses is condemned . . . . The Constitution of Texas, Art. 16, § 59(a) . . . designates rivers and streams as natural resources,

184. Baxley v. Alaska, 958 P.2d 422, 434 (Alaska 1998). Nevertheless, mining is not an activity protected by the public trust. Commercial uses protected under the *Illinois Central Railroad* decision are

> commerce in the sense of trade, traffic or transportation of goods over navigable waters, a meaning which does not include mining. Most importantly, a mining claim is not a "public use," but rather an exclusive, depleting use of a non-renewable resource for public profit. We believe that even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises.

Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993).

185. McDowell v. Alaska, 785 P.2d 1, 16 (Alaska 1989).

186. Brooks v. Wright, 971 P.2d 1025, 1031 (Alaska 1999) (citation omitted). *But see* Pullen v. Ulmer, 923 P.2d 54, 60 (Alaska 1996) (noting that the state has a trust responsibility to manage fish, wildlife, and water resources, including salmon).

187. Brady v. Alaska, 965 P.2d 1, 17 (Alaska 1998).

> declares that such belong to the State, and expressly invests the Legislature with the preservation and conservation of such resources.[188]

In 2005, moreover, the court indicated that the public trust doctrine allows the state to "conserve natural resources."[189]

Washington has also flirted with applying some version of a public trust doctrine to wildlife, especially shellfish. For example, the Washington Court of Appeals has stated that the public trust doctrine applies to the Washington Department of Natural Resources' regulation of shellfish, such as geoducks.[190] Nevertheless, the Department's regulation of the commercial geoduck harvest did not violate the public trust doctrine despite the public right to fish, because: (1) the state must "balance the protection of the public's right to use resources on public land with the protection of the resources that enable these activities"; (2) the Department had not given up its control over the state's geoduck resources; and (3) the regulation facilitated sustainable geoduck harvesting and natural regeneration of the resource, serving the public interest.[191] These conclusions thus fairly clearly suggest that Washington is beginning to connect public trust principles to sustainable development.

Similarly to Washington, North Dakota has considered the role of the public trust doctrine with regard to more general ecological considerations but has nevertheless continued to confine the doctrine's application to water resources. The North Dakota Supreme Court acknowledged as early as 1976 that "[i]t is evident that the Public Trust Doctrine is assuming an expanding role in environmental law."[192] The public trust doctrine does not prohibit all development, and hence the State Engineer can grant permits to drain wetlands, especially when he studied the consequences, imposed permit conditions, and was subject to a public interest requirement.[193] Nevertheless, the public trust doctrine *does* limit the state's discretionary authority "to allocate vital state resources," as enunciated in *Illinois Central Railroad.*[194] Nor is the doctrine restricted to conveyances of submerged lands; "[t]he State holds the navigable waters, as well as the lands beneath them, in trust for the public," as provided in

188. Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942).

189. Cummins v. Travis County Water Control & Improvement Dist. No. 17, 175 S.W.2d 34, 49 (Tex. App. 2005).

190. Wash. State Geoduck Harvest Ass'n v. Wash. State Dept. of Natural Res., 101 P.3d 891, 895 (Wash. App. 2004). *But see* Citizens for Responsible Wildlife Mgmt. v. Washington, 103 P.3d 203, 205 (Wash. App. 2004) ("No Washington case has applied the public trust doctrine to *terrestrial* wildlife or resources. But we need not decide whether the public trust doctrine applies [to prohibitions on terrestrial hunting and trapping] because, even if it does, Citizens' challenge fails." (emphasis added)).

191. *Wash. State Geoduck Harvest Ass'n*, 101 P.3d at 895, 896–97.

192. United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

193. In the Matter of the Application for Permits to Drain Related to Stone Creek Channel Improvements and White Spur Drain, 424 N.W.2d 894, 901 (N.D. 1988) (citing *United Plainsmen Ass'n*, 247 N.W.2d at 463 (quoting Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth 1973))).

194. *United Plainsmen Ass'n*, 247 N.W.2d at 460 .

the North Dakota Constitution and refined by statute.[195] As a result, "protecting the integrity of the waters of the State is a valid exercise of the [North Dakota Water Commission's] duties," allowing it, for example, to control the drainage of a lake.[196]

More general—but also more embryonic—discussions of an ecological public trust have also surfaced in South Dakota and Utah. The South Dakota Supreme Court has determined that the state's Environmental Protection Act embodies a broader public trust doctrine than the navigable waters public trust alone would allow.[197] This Act "authoriz[es] legal action to protect 'the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.'"[198] Utah also appears to be extending its public trust doctrine to ecological protection, because, according to the Utah Supreme Court, "[t]he 'public trust' doctrine . . . protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large."[199]

CONCLUSION

In contrast to the many discussions over the years seeking to accurately describe "the" public trust doctrine, this Article argues that the contemporary power of public trust concepts lies not in tracing their historical bases but rather in embracing their status as varying and evolving state common law. Like any other category of state common law, such as early landlord/tenant law, tort law, or contract law, state public trust doctrines both reflect historic concerns and public policies—specifically, the particular public concerns regarding water in particular locations of the United States—and provide the states with an "ability to adapt to emerging societal needs."[200] State courts on both sides of the Hundredth Meridian have celebrated the flexible and evolutionary nature of their public trust doctrines,[201] but scholars have been reluctant to embrace the rich mixture of approaches to balancing public and private rights in water and other natural resources that has emerged.[202]

195. *Id.* at 461 (also noting that "[w]e believe that § 61-01-01, NDCC, expresses the Public Trust Doctrine.").

196. N.D. State Water Comm'n v. Bd. of Managers, 332 N.W.2d 254, 258 (N.D. 1983).

197. Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004).

198. *Id.* (quoting S.D. CODIFIED LAWS § 34A-10-1 (1973)).

199. Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 919 (Utah 1993).

200. Wood, *supra* note 143, at 78.

201. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

202. *See, e.g.*, David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 713–20 (2008) (laying out a singular public trust doctrine). *See generally* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007) (discussing at length the "mythical" history of a singular American public trust doctrine).

The western states, ranging from Hawai'i and California on one end of a complex spectrum to Arizona and Colorado on the other, provide a particularly instructive diversity of approaches to the recognition (or not) of public rights in, and the public values of, water and other aspects of the environment. In comparing the public trust doctrines of the western states, moreover, four factors emerge as most important in the evolution of state public trust doctrines. First, the severing of water rights from real property ownership and the riparian rights doctrine freed these states from one set of potentially confining private property rights. Second, subsequent state declarations of public ownership of fresh water allow western states' public trust doctrines to operate independently of state title to submerged lands and federal pronouncements regarding "the" public trust doctrine. Third, perceptions of shortages of fresh water, submerged lands, and environmental amenities have prompted increased interest, compared to the East, in preserving the public values in these resources. Finally, the willingness of most western states to raise water and other environmental issues to constitutional status and/or to incorporate broad public trust mandates into statutes has encouraged their courts to evolve water-based public trust principles into expanding ecological public trust doctrines.

As the most recent cases demonstrate, and despite occasional limiting interventions by states legislatures (as in Idaho), the evolution of western state public trust doctrines is not slowing. Instead, in true common law fashion, state courts are using state public trust doctrines to respond to particular and emerging state needs—the loss of native species and critical need to protect coastal waters in Hawai'i; profound conflicts between appropriators, species, and ecological values in California; and the perhaps climate-change driven appearance of new publicly usable water resources in South Dakota. While such evolutions and expansions complicate the identity—indeed, the very existence—of any unitary, national, perhaps Constitution-based public trust doctrine, they also provide place-based balancings of public and private needs and values in that most basic of natural resources—fresh water—that may better serve the long-term interests of the nation as a whole.

APPENDIX: SUMMARIES OF INDIVIDUAL STATE PUBLIC TRUST DOCTRINES

ALASKA

Date of Statehood: 1959

Water Law System: Prior appropriation

Alaska Constitution: Alaska has constitutionalized some of the access and use rights guaranteed by the public trust doctrine. Article VIII of the Alaska Constitution governs natural resources, including waters and submerged lands. Relevant provisions of this Article include:

- § 1: "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."
- § 2: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."
- § 3: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."
- § 5: "The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of fisheries, wildlife, and waters."
- § 6: "Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain."
- § 8: "The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions."
- § 9: "Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources.

Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages."

- § 13: "All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife."
- § 14: "Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes."
- § 15: "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State."

Alaska Statutes:

- ALASKA STAT. § 38.04.062: In general, "the state owns all submerged land underlying navigable water to which title passed to the state at the time the state achieved statehood under the equal footing doctrine" or under the federal Submerged Lands Act of 1953.[203] The Commissioner must make a list of all waters deemed navigable or nonnavigable by state or federal agencies or courts, but "[w]ater not included on the lists . . . is not considered either navigable or nonnavigable until the commissioner has made a determination as to its navigability at the time the state achieved statehood."[204] However, submerged lands that the state conveyed pursuant to state statute are not governed by this section.[205] "Navigable water," for purposes of this statute, is "water that, at the time the state achieved statehood, was used, or was susceptible of being used, in its ordinary condition as a highway for commerce over which trade and travel were or could have been conducted in the customary modes of trade and travel on water; the use or

203. ALASKA STAT. § 38.04.062(a) (2009) (referencing 43 U.S.C. §§ 1301–15 (1953)).
204. *Id.* § 38.04.062(b), (c), (d).
205. *Id.* § 38.04.062(f).

potential use does not need to have been without difficulty, extensive, or long and continuous . . . ."[206]

- ALASKA STAT. § 38.05.126: This statute recognizes the public trust doctrine in Alaska, declaring that: (a) "[t]he people of the state have a constitutional right to free access to and use of the navigable or public water of the state"; (b) "that state holds and controls all navigable or public water in trust for the use of the people of the state"; (c) "[o]wnership of land bordering navigable or public water does not grant an exclusive right to the use of the water and a right of title to the land below the ordinary high water mark is subject to the rights of the people of the state to use and have access to the water for recreational purposes or other public purposes for which the water is used or capable of being used consistent with the public trust"; and (d) nothing in this statute "affect[s] or abridge[s] valid existing rights or create a right or privilege of the public to cross or enter private land."
- ALASKA STAT. § 38.05.127: Before the state can sell, lease, grant, or otherwise dispose of lands adjacent to water, the Commissioner must determine whether the water is a navigable water, a public water, or neither. If the water is navigable or public, the state must "provide for the specific easements or rights-of-way necessary to ensure free access to and along the body of water, unless the commissioner finds that regulation or limiting access is necessary for other beneficial uses or public purposes."
- ALASKA STAT. § 38.05.128: No person may obstruct a navigable water or interfere with others' use of that water unless authorized by state or federal law. "An unauthorized obstruction or interference is a public nuisance and is subject to abatement." Moreover, "[f]ree passage or use of any navigable water includes the right to use land below the ordinary high water mark to the extent reasonably necessary to use the navigable water consistent with the public trust," and "[f]ree passage or use of any navigable water includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water . . . ."
- ALASKA STAT. § 38.05.825: "Unless the commissioner finds that the public interest in retaining state ownership of the land clearly outweighs the municipality's interest in obtaining the land, the commissioner shall convey to a municipality tide or submerged land requested by the municipality that is occupied or suitable for occupation and development," so long as the land is within or contiguous to the municipality and "use of the land would not unreasonably interfere with navigation or public access."

206. *Id.* § 38.04.062(g).

- ALASKA STAT. § 38.05.965: This statute defines "navigable water" for purposes other than state title and also distinguishes "navigable water" and "public water." "Navigable water" is "any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes . . . ."[207] "Public water" is "navigable water and all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest . . . ."[208] The statue also includes other definitions of relevance to the state public trust: "shoreland" is "land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark"; "submerged land" is "land covered by tidal water between the line of mean low water and seaward to a distance of three geographical miles or further as may hereafter be properly claimed by the state"; and "tideland" is "land that is periodically covered by tidal water between the elevation of mean high water and mean low water . . . ."[209]
- ALASKA STAT. §§ 46.15.010–46.15.270: Alaska Water Use Act. "Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water, as provided in this chapter."[210] Reservations are allowed for fish.[211] Appropriations are subject to a public interest review, which includes "the effect on fish and game resources and on public recreational opportunities" and "the effect upon access to navigable or public water."[212] Moreover, the Act allows reservations of water or instream flows to "protect . . . fish and wildlife habitat, migration, and propagation," for "recreation and park purposes," for "navigation and transportation purposes," and for "sanitary and water quality purposes."[213]

207. *Id.* § 38.05.965(13).
208. *Id.* § 38.05.965(18).
209. *Id.* § 38.05.965(20), (22), (23).
210. *Id.* § 46.15.030.
211. *Id.* § 46.15.035(c).
212. *Id.* § 46.15.080(b)(3), (8).
213. *Id.* § 46.15.145(a).

Definition of "Navigable Waters":

By statute, Alaska has adopted the federal title definition of "navigable water" to identify the waters for which the state owns the bed and banks. Thus, "navigable water" for state title purposes is

> water that, at the time the state achieved statehood, was used, or was susceptible of being used, in its ordinary condition as a highway for commerce over which trade and travel were or could have been conducted in the customary modes of trade and travel on water; the use or potential use does not need to have been without difficulty, extensive, or long and continuous . . . .[214]

For other purposes, including public rights in waters, a "navigable water" is

> any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes . . . .[215]

In addition, the public has rights in "public waters," which by statute include not only navigable waters but also "all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest . . . ."[216]

Because of federal reservations, however, Alaska did *not* acquire title to the submerged lands within the boundary of the National Petroleum Reserve or the Arctic National Wildlife Refuge.[217] Nor does Alaska hold title to the lower inlet of Cook Inlet.[218]

Rights in "Navigable Waters":

In general, the state owns the beds of the navigable waters "up to the ordinary high-water mark."[219] However, the public has rights of access and use

214. *Id.* § 38.04.062(g).
215. *Id.* § 38.05.965(13).
216. *Id.* § 38.05.965(18).
217. United States v. Alaska, 521 U.S. 1, 36–46 (1996).
218. United States v. Alaska, 422 U.S. 184, 200–04 (1975).
219. Alaska Dep't of Natural Res. v. Pankratz, 538 P.2d 984, 988 (Alaska 1975); *see also* Pankratz v. Alaska Dep't of Highways, 652 P.2d 68, 73 (Alaska 1982) (noting that "it is clear that a state has title to land underlying navigable waters up to the mean high water mark").

to both state-defined navigable and public waters, even if the landowner owns below the high-water mark.[220]

In its case law regarding public uses, Alaska remains closely aligned with the principles set forth in *Illinois Central Railroad*. For example, tidelands "are subject to the public's right to use tidelands for navigation, commerce, and fishing."[221] However, by statute, Alaska deems state "navigable waters" to include waters that are usable for "floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes,"[222] suggesting that these uses are also protected under the state public trust doctrine. No person may obstruct a navigable water or interfere with others' use of that water unless authorized by state or federal law,[223] and "[a]n unauthorized obstruction or interference is a public nuisance and is subject to abatement."[224] Moreover, "[f]ree passage or use of any navigable water includes the right to use land below the ordinary high water mark to the extent reasonably necessary to use the navigable water consistent with the public trust," and "[f]ree passage or use of any navigable water includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water . . . ."[225]

Also in line with *Illinois Central Railroad*, conveyances of tidelands to private owners generally convey only "naked title," and the tidelands remain subject to the public trust unless the conveyance meets the *Illinois Central Railroad* criteria—"first, whether the conveyance was made in furtherance of some specific public trust purpose and, second, whether the conveyance can be made without substantial impairment of the public's interest in state tidelands."[226] No such intent is present in § 38.05.820 of the Alaska statutes, especially in light of Article VIII, § 3 of the Alaska Constitution, so those conveyed tidelands remain subject to the public trust.[227] Moreover, even conveyances of tidelands to municipalities pursuant to § 38.05.825 remain subject to the public trust; "[t]he conveyance transfer to the municipality the state's right to use and manage the tidelands, but does not confer the right to sell of dispose of the lands or exempt them from the public trust doctrine."[228]

In terms of resource protection, "[t]he public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use and that government owes a fiduciary duty to maintain such

220. ALASKA STAT. § 38.05.126.
221. City of St. Paul v. Alaska Dep't of Natural Res., 137 P.3d 261, 263 n.8 (Alaska 2006).
222. ALASKA STAT. § 38.05.965(13).
223. *Id.* § 38.05.128.
224. *Id.*
225. *Id.*
226. CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118–19 (Alaska 1988).
227. City of St. Paul v. Alaska Dep't of Natural Res., 137 P.3d 261 (Alaska 2006).
228. *Id.*

resources for the common good of the public as beneficiary."[229] Nevertheless, mining is not an activity protected by the public trust. Commercial uses protected under the *Illinois Central Railroad* decision are

> commerce in the sense of trade, traffic or transportation of goods over navigable waters, a meaning which does not include mining. Most importantly, a mining claim is not a 'public use,' but rather an exclusive, depleting use of a non-renewable resource for public profit. We believe that even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises.[230]

The public trust doctrine per se does not extend to wildlife management, although the state does have a duty under Article VIII, § 3 of the Alaska Constitution to manage fish, wildlife, and water resources for the people's benefit, "to guarantee the common citizen participation in wildlife harvest, and to divest the [government] of exclusive entitlement to those resources."[231] According to the Alaska Supreme Court:

> We have frequently compared the state's duties as set forth in Article VIII to a trust-like relationship in which the state holds natural resources such as fish, wildlife, and water in "trust" for the benefit of all Alaskans. Instead of recognizing the creation of a public trust in these clauses *per se*, we have noted that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state."[232]

Access rights are equal for both personal and professional fishing.[233] However, in general, the state cannot be liable in damages under the public trust doctrine for allowing the destruction of natural resources, such as when beetles destroyed trees.[234]

ARIZONA

Date of Statehood: 1912

Water Law System: Prior appropriation

Arizona Constitution: Article XVII of the Arizona Constitution governs water rights. Relevant provisions include:

229. Baxley v. Alaska, 958 P.2d 422, 434 (Alaska 1998).
230. Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993).
231. McDowell v. State, 785 P.2d 1, 16 (Alaska 1989).
232. Brooks v. Wright, 971 P.2d 1025, 1031 (Alaska 1999) (citation omitted). *But see* Pullen v. Ulmer, 923 P.2d 54, 60 (Alaska 1996) (noting that the state has a trust responsibility to manage fish, wildlife, and water resources, including salmon).
233. Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 497 (Alaska 1988).
234. Brady v. State, 965 P.2d 1, 17 (Alaska 1998).

- § 1: "The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the State."
- § 2: "All existing rights to the use of any of the waters in the State for all useful or beneficial purposes are hereby recognized and confirmed."

Arizona Statutes:

- ARIZ. REV. STAT. §§ 37-1130 to 37-1156: State Claims to Streambeds. These provisions establish the Arizona Navigable Stream Adjudication Commission, which acts as an advocate for the public trust.[235] The Commission issues a determination of navigability after a public hearing and issues a report on the public trust values of any navigable stream or watercourse.[236] Its determinations are subject to judicial review.[237] A determination of non-navigability relinquishes the state's claims to the bed and banks.[238] The state can appropriate water "to maintain and protect public trust values," but only by complying with the normal requirements for an appropriation.[239] The statute also provides for refunds of taxes and purchase prices, and compensation for improvements to landowners who "lose" title to the beds of waters determined to be navigable.[240] Finally, the statutes provide a petition process to release public trust status.[241] In these provisions, "navigable watercourse" "means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water."[242] The state generally owns the beds and banks of navigable watercourses to the ordinary high watermark.[243] "Public trust land" is "the portion of the bed of a watercourse that is located in this state and that is determined to have been a navigable watercourse as of February 14, 1912. Public trust land does not include land held by this state pursuant to any other trust."[244] "Public trust purposes" and "public trust values" are "commerce, navigation, and fishing."[245]

235. ARIZ. REV. STAT. § 37-1121 (LexisNexis 2009).
236. *Id.* § 37-1128.
237. Id. § 37-1129.
238. Id. § 37-1130.
239. *Id.*
240. *Id.* § 37-1132.
241. *Id.* § 37-1151.
242. *Id.* § 37-1101(5).
243. *Id.* § 37-1101(6).
244. *Id.* § 37-1101(8).
245. *Id.* § 37-1101(9).

"Watercourse" does not include man-made water conveyance systems.[246]

- ARIZ. REV. STAT. §§ 45-101 to 45-343: Department of Water Resources and Appropriation. "The waters of all sources, flowing in streams, canyons, ravines, or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter."[247] Arizona's water law creates a hierarchy of the relative value of uses of water: (1) domestic and municipal; (2) irrigation and stock watering; (3) power and mining; (4) recreation and wildlife, including fish; and (5) nonrecoverable water storage.[248] In the 1995 laws discussing these provisions, "the legislature declares that it does not intend to create an implication that the public trust doctrine applies to water rights in this state."[249]

Definition of "Navigable Waters":

By statute, Arizona limits "navigable waters"—and its public trust doctrine—to those waters subject to the federal equal footing doctrine. As such, a navigable watercourse for purposes of both state title and the application of the public trust doctrine is

> a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.[250]

"Public trust lands" are limited to the beds of these navigable watercourses.[251]

The United States Supreme Court has repeatedly confirmed that the Colorado River in Arizona is navigable, and that Arizona owns the beds and banks of that river.[252]

246. *Id.* § 37-1101(11).
247. *Id.* § 45-141(A).
248. *Id.* § 45-157(B).
249. 1995 Ariz. Sess. Laws ch. 9, § 25(B).
250. ARIZ. REV. STAT. § 37-1101(5).
251. *Id.* § 37-1101(8).
252. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 319 (1973) (noting that Arizona holds title to the bed of the Colorado River), *overruled on other grounds*, Or. *ex rel.* State Lands Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370–72 (1977); Arizona v. California, 283 U.S. 423, 452–54 (1931) (holding that the Colorado River below Black Canyon is navigable).

Rights in "Navigable Waters":

The state's title to the beds and banks of navigable waters, like the Colorado River, extends up to the ordinary high water mark.[253] This line is defined by soil and vegetation, [254] but is *not* "the line reached by the water in unusual floods."[255]

By statute, Arizona limits "public trust purposes" and "public trust values" to the three uses recognized in *Illinois Central Railroad*: commerce, navigation, and fishing.[256] Moreover, while the state can appropriate water to promote these uses, it must follow the normal appropriation requirements and does not receive any preference in priority.[257] However, the Arizona Court of Appeals recently emphasized in connection with the Central Arizona Water Conservation District that landowners take their properties subject to existing and initiated water rights,[258] suggesting that the public trust doctrine can insulate the state from regulatory takings claims.

Like many western states, Arizona manages groundwater under a different regulatory regime—the Groundwater Management Act of 1980—than it manages surface water rights. The Arizona courts have determined that the state public trust doctrine does not apply to the Groundwater Management Act.[259] As a result, the public trust doctrine cannot influence the establishment of rights to pump groundwater in Arizona.

Since 1987, Arizona's legislature has engaged in numerous efforts to restrict the public trust doctrine's application in the state, only to be thwarted repeatedly by the Arizona courts. The controversy began in 1985, when Arizona officials began asserting state ownership rights in the beds of the state's navigable waters based on the federal equal footing doctrine; until that time, the Colorado River had been the state's only equal footing/public trust claim.[260] In 1987, the legislature responded with H.B. 2017, which attempted to relinquish most of Arizona's title claims through an "uncompensated quitclaim of the state's equal footing interest in all watercourses other than the Colorado, Gila, Salt, and Verde Rivers and in all lands formerly within those

253. State v. Bonelli Cattle Co., 495 P.2d 1312, 1313 (Ariz. 1972).
254. *Id.* at 1314.
255. *Id.* at 1315.
256. ARIZ. REV. STAT. § 37-1101(9).
257. *Id.* § 37-1130.
258. S. W. Sand & Gravel, Inc. v. Cent. Arizona Water Conservation Dist., 212 P.3d 1, 4 (Ariz. Ct. App. 2008); W. Maricopa Combine, Inc. v. Arizona Dep't of Water Res., 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001).
259. Seven Springs Ranch, Inc. v. State *ex rel.* Arizona Dep't of Water Res., 753 P.2d 161, 165–66 (Ariz. Ct. App. 1987).
260. For additional information about the controversy, see Tracey Dickman Zobenica, *The Public Trust Doctrine in Arizona's Streambeds*, 38 ARIZ. L. REV. 1053, 1059–78 (1996).

rivers but outside their current beds."[261] The Arizona Court of Appeals held many of the relevant provisions unconstitutional.[262] It declared that every future land patent includes the equal footing interest, that the standard of navigability is federal, and that navigability is established as of the date of statehood.[263] Relying on *Illinois Central Railroad*, moreover, the Court of Appeals declared that "the state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself," and "the state must administer its interest in lands subject to the public trust consistently with trust purposes."[264]

In 1995, the legislature amended Arizona's water law to include a provision stating:

> The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating attributes of water rights pursuant to this article, the court shall not make a determination as to whether public trust values are associated with any or all of the river system or resource.[265]

The Arizona Supreme Court found these provisions unconstitutional.[266]

Finally, in 1998, after fact-finding by the Arizona Navigable Stream Adjudication Commission pursuant to 1994 amendments to Arizona's water law, the Arizona legislature enacted S.B. 1126. This statute "disclaim[ed] the state's 'right, title, or interest based on navigability and the equal footing doctrine' to the bed lands of the Agua Fria, New, Hassayampa, and Lower Salt Rivers, as well as Skunk Creek" and Verde River, based on an overly constricted definition of "navigable."[267] The Arizona Court of Appeals found that S.B. 1126 violated both the gift clause in Arizona's Constitution and the public trust doctrine.[268] Moreover, with respect to the public trust, the court held that the legislature had to apply the navigability test from *The Daniel Ball*,[269] to determine what qualified as a "navigable water," and that the legislature had constructed a much more constrained test for navigability than the *Daniel Ball* standard.[270] Because federal law under the equal footing doctrine presumes that the state has title to beds and banks of navigable waters, federal law preempted S.B. 1126.[271]

261. Arizona Ctr. for Law in the Public Interest v. Hassell, 837 P.2d 158, 162 (Ariz. Ct. App. 1991).
262. *Id.* at 173.
263. *Id.* at 163–65.
264. *Id.* at 168.
265. ARIZ. REV. STAT. § 45-263(B) (LexisNexis 2009).
266. San Carlos Apache Tribe v. Superior Court *ex rel.* County of Maricopa, 972 P.2d 179, 199 (Ariz. 1999).
267. Defenders of Wildlife v. Hull, 18 P.3d 722, 727 (Ariz. Ct. App. 2001).
268. *Id.* at 729.
269. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).
270. *Id.* at 730–37.
271. *Id.* at 737.

This litigation made clear that the Arizona courts view the public trust doctrine as a *federal* constitutional issue because the equal footing doctrine is grounded in the U.S. Constitution[272]:

> The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. The Legislature cannot order the courts to make the doctrine inapplicable to these or any other proceedings. . . . It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority.[273]

As such, the state has a duty to assert its ownership interest in navigable or potentially navigable waters, and the courts will remand cases where the state has not done so.[274] For example, estoppel may not be asserted to defeat the public interest in navigable waters.[275]

CALIFORNIA

Date of Statehood: 1850

Water Law System: California Doctrine—mostly prior appropriation, but with recognition of some riparian rights

California Constitution: Several provisions of the California Constitution embody or are otherwise relevant to the state's public trust doctrine. Article X, for example, governs water, Article XA governs water resources development, and Article XB contains the Marine Resources Protection Act of 1990. Especially relevant provisions of these and other articles include:

- Art. I, § 25: "The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken."
- Art. X, § 1: "The right of eminent domain is hereby declared to exist in the State to all frontages on the navigable waters of this State."

272. *See* Arizona Ctr. for Law in the Public Interest, 837 P.2d 158, 161–62 (Ariz. Ct. App. 1991).

273. San Carlos Apache Tribe v. Superior Court *ex rel.* County of Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (citing *Arizona Ctr. for Law in the Public Interest*, 837 P.2d at 166–68).

274. Calmat of Ariz. v. State *ex rel.* Miller, 836 P.2d 1010, 1020–21 (Ariz. Ct. App. 1992).

275. *Id.* at 1021.

- Art. X, § 2: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled."
- Art. X, § 3: "All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations; provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest."
- Art. X, § 4: "No individual, partnership, or corporation, claiming or possessing the frontage or tide lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction of this provisions, so that access to the navigable waters of this State shall always be attainable for the people thereof."

- Art. X., § 5: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."
- Art. XA, § 3: "No water shall be available for appropriation by storage in, or by direct diversion from, any of the components of the California Wild and Scenic River System, as such system exists on January 1, 1981, where such appropriation is for export of water into another major hydrologic basin of the state, . . . unless such export is expressly authorized prior to such appropriation be: (a) an initiative statute approved by the electors, or (b) the Legislature, by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring."
- Art. XB, § 14: "Prior to January 1, 1994, the Fish and Game Commission shall establish four new ecological reserves in ocean waters along the mainland coast. Each ecological reserve shall have a surface area of at least two square miles. The commission shall restrict the use of these ecological reserves to scientific research relating to the management and enhancement of marine reserves."
- Art. XB, § 15: "This article does not preempt or supersede any other closures to protect any other wildlife, including sea otters, whales, and shorebirds."

California Statutes:

- CAL. PUB. RES. CODE §§ 6301 to 6369.3: Administration and Control of Swamp, Overflowed, Tide, or Submerged Lands, and Structures Thereon. These provisions give "exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the State" to the State Lands Commission.[276] Any exchanges of lands that are subject to the public trust doctrine must ensure that the lands acquired "will provide a significant benefit to the public trust" and that "the exchange does not substantially interfere with public rights of navigation and fishing."[277]
- CAL. WATER CODE §§ 1200 to 1248: Appropriation. "All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."[278] These provisions

276. CAL. PUB. RES. CODE § 6301 (2009).
277. *Id.* § 6307.
278. CAL. WATER CODE § 1201 (2009).

allow for protections of flows to "protected areas,"[279] and establish that "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."[280]

- CAL. GOV'T CODE § 39933: "All navigable waters situated within or adjacent to a city shall remain open to the free and unobstructed navigation of the public. Such waters and the water front of such waters shall remain open to free and unobstructed access by the people from the public streets and highways within the city."
- CAL. GOV'T CODE § 56740: "No tidelands or submerged lands... which are owned by the State or by its grantees in trust shall be incorporated into, or annexed to, a city, except lands which may be approved by the State Lands Commission." For purposes of this provision, "'submerged lands' . . . includes, but is not limited to, lands underlying navigable waters which are in sovereign ownership of the State whether or not those waters are subject to tidal influence."
- CAL. GOV'T CODE §§ 66478.1 to 66478.14: Public Access to Public Resources. These public access provisions apply to navigable waters.[281] "The Legislature further finds and declares that it is essential to the health and well-being of all citizens of this state that public access to public natural resources be increased. It is the intent of the Legislature to increase public access to public natural resources."[282]
- CAL. HARB. & NAV. CODE § 36: "'Navigable waters' means waters which come under this jurisdiction of the United States Army Corps of Engineers and any other waters with the state with the exception of those privately owned."
- CAL. HARB. & NAV. CODE §§ 90 to 153: Navigable Waters. "Navigable waters and all streams of sufficient capacity to transport the products of this country are public ways for purposes of navigation and such transportation."[283] However, navigable waters do not include floodwaters.[284] These provisions also expressly list several watercourses as navigable waters and public ways,[285] and they define California's coastline.[286]

279. *Id.* §§ 1215–1216.
280. *Id.* § 1243.
281. CAL. GOV'T CODE § 66478.1 (2009).
282. *Id.* § 66478.3.
283. CAL. HARB. & NAV. CODE § 100 (2009).
284. *Id.*
285. *Id.* §§ 101–106.
286. *Id.* § 107.

- CAL. HEALTH & SAFETY CODE § 117510: "'Navigable waters' means all public waters of the state in any river, stream, lake, reservoir, or other body of water, including all salt water bays, inlets, and estuaries within the jurisdiction of the state."

Definition of "Navigable Waters":

The California courts recognize the differences between various definitions of "navigable waters." For example, in 1976 the California Court of Appeals acknowledged that there were two relevant federal definitions of navigability: the Commerce Clause definition and the state title definition. Further, the state title test from *Utah v. United States* determines the waters for which California holds title to the bed and banks as a result of its admission to the Union.[287] However, the court also recognized that for non-federal matters, the states are free to use different definitions of "navigable waters" to determine rights.[288]

Under these rules, "[w]aters which are subject to tidal influence are subject to the public trust regardless of whether they are navigable."[289] Although the boundary between public and private ownership in littoral waters is the low-water mark,[290] in tidal waters, the "lands between the mean high tide and mean low tide are owned by the public."[291] "Tidelands" can cover both true tidelands and submerged lands more generally.[292]

In addition, California has explicitly rejected arguments based on traditional English common law that state ownership of submerged lands is limited to tidal waters.[293] Instead, the California Supreme Court has emphasized that lands beneath nontidal navigable waters "constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state."[294]

Upon its admission to the Union, California received title to the beds and banks of federally defined navigable waters "to the high-water mark."[295] Nevertheless, an 1872 statute conveyed title to properties bordering these lands to the low-water mark.[296] Even so, the public trust doctrine applies to the lands

287. Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830, 834 (Cal. Ct. App. 1976).
288. *Id.* at 835.
289. Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 841 n.3 (Cal. Ct. App. 1989).
290. County of Lake v. Smith, 278 Cal. Rptr. 809, 819–20 (Cal. Ct. App. 1991).
291. California v. Superior Court (Lyon), 625 P.2d 239, 241 (Cal. 1981).
292. City of Berkeley v. Superior Court, 606 P.2d 362, 363 n.1 (Cal. 1980).
293. *California v. Superior Court (Lyon)*, 625 P.2d at 242–45.
294. *Id.* at 242.
295. *Id.* at 246.
296. *Id.* at 245, 248; Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 401–02 (Cal. Ct. App. 1992).

between the low- and high-water marks, although the landowner "may utilize them in any manner not incompatible with the public's interest in the property."[297]

For purposes of state-law public trust rights, a stream that can only float logs is not navigable.[298] Landowners can obstruct non-navigable waters at will.[299]

Nevertheless, "all waters are deemed navigable which are really so."[300] "A waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust."[301] Moreover, "[t]here is no authority, or at least none cited to use, for the proposition a river must be designated 'non-navigable' because it may be navigated only seasonally."[302]

The U.S. Supreme Court has declared that the Sacramento River in California is navigable and that private landowners along that river received title only to the high water mark.[303] In addition, and supported by the fact that California legislatively deemed the Klamath River in California non-navigable, the Supreme Court held that title to the Klamath River's beds in California remained with the United States and became part of the Hoopa Valley Reservation.[304]

Rights in "Navigable Waters":

Article X of the California Constitution constitutionalizes the public trust doctrine in California.[305] California acquired title to the navigable waterways and tidelands by virtue of her sovereignty when admitted to the Union in 1850.[306] The traditional uses that the trust protects are navigation, commerce,

297. *California v. Superior Court (Lyon)*, 625 P.2d at 252; Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 257 Cal Rptr. 836, 839 (Cal. Ct. App. 1989).

298. People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 488, 450 (Cal. Ct. App. 1971) (citing American River Water Co. v. Amsden, 6 Cal. 443, 443–46 (1856)).

299. *Id.*

300. Churchill Co. v. Kingsbury, 174 P. 329, 330–31 (Cal. 1918).

301. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 720 n. 17 (Cal. 1983) (citing People *ex rel.* Younger v. County of El Dorado, 157 Cal. Rptr. 815 (Cal. Ct. App. 1979); *Baker*, 97 Cal. Rptr. at 448); *see also Golden Feather*, 257 Cal. Rptr. 836, 839 n.2; People v. Weaver, 197 Cal. Rptr. 521, 524 n.2 (Cal. App. Dep't Super. Ct. 1983); Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830, 834 (Cal. Ct. App. 1976); *Baker*, 97 Cal. Rptr. at 450 (all asserting the same pleasure/recreational boating test).

302. Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 402 n.2 (Cal. Ct. App. 1992); *accord Hitchings*, 127 Cal Rptr. at 837.

303. Packer v. Bird, 137 U.S. 661, 666–68, 672–73 (1891).

304. Donnelly v. United States, 228 U.S. 243, 260–64 (1913).

305. *See, e.g.*, *Younger*, 157 Cal. Rptr. at 835 (holding that public access to the South Fork of the American River for whitewater rafting is protected by the California Constitution).

306. Marks v. Whitney, 491 P.2d 374, 379 n.5 (Cal. 1971) (citing Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10, 15–16 (1935)).

and fishing.[307] More expansively, public trust rights "have been held to include the right to fish, hunt, bathe, swim, to use for boating, and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[308] Importantly, the California Supreme Court considers the public trust doctrine to be adaptable and evolving, noting that "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."[309]

"The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters."[310] Specifically, "[p]reservation of the public trust in the shorezone will allow the state flexibility in determining the appropriate use of such land so that, for example, areas which are endangered by overuse can be closed to certain activities," because "[t]he exercise of the police power has proved insufficient to protect the shorezone."[311] No estoppel is available against the government with respect to public trust interests,[312] and exercise of the public trust doctrine is not an unconstitutional taking of private property.[313] However, "the public trust doctrine as codified in the California Constitution does not prevent the state from preferring one trust use over another" in particular situations.[314] Moreover, the state can delegate its regulatory authority over particular public trust lands to state agencies and municipalities.[315]

In early parts of California's history, the state extensively conveyed public trust lands to private individuals for a variety of purposes. For example, about one-quarter of the original San Francisco Bay was conveyed into private ownership and filled for development. As a result, California recognizes different public trust rights in different public trust lands. Nevertheless, the public generally retains its public trust rights even when the state has conveyed tidelands and lands under navigable waters to private owners, unless the state

307. *Id.*

308. *Id.* at 380 (citations omitted); City of Berkeley v. Superior Court, 606 P.2d 362, 365 (Cal. 1980); Graf v. San Diego Unified Port Dist., 7 Cal. App. 4th 1224, 1228–29 (Cal. Ct. App. 1992).

309. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983) (citing *Marks*, 491 P.2d at 374); *see also* Personal Watercraft Coal. v. Bd. of Supervisors, 122 Cal. Rptr. 2d 425, 437 (Cal. Ct. App. 2002) (repeating that the doctrine is "sufficiently flexible to encompass changing public needs" (citations omitted)).

310. *Marks*, 491 P.2d at 380 (citations omitted); *Graf*, 7 Cal. App. 4th at 1228–29, 1231–32.

311. California v. Superior Court (Fogerty), 625 P.2d 256, 260 (Cal. 1981).

312. *Id.* at 258–59.

313. *Nat'l Audubon Soc'y*, 658 P.2d at 723.

314. Carstens v. Cal. Coastal Comm'n, 227 Cal. Rptr. 346, 360 (Cal. Ct. App. 1986).

315. *Graf*, 7 Cal. App. 4th at 1231–32.

conveyed the lands in furtherance of navigation or commerce.[316] Thus, the public trust applies to the "lands between high and low water in nontidal navigable lakes," even if that land in is private ownership.[317] Especially since the public trust amendments to the California Constitution in 1879, public trust lands "may be conveyed to private persons only to promote trust uses,"[318] and

> statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in the tidelands, the court must give the statute such an interpretation.[319]

When trust lands *have* been conveyed to private individuals, "the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes."[320] However,

> there is no legal obligation on the part of a landowner subject to the public trust doctrine to inspect or warn of natural hazards in navigable waters subject to recreational use abutting the property, or to make such water safe for recreational uses by trespassers or those on the water by means other than access over abutting land.[321]

As a result, landowners along navigable waters who do not alter those waters are entitled to the tort liability protections in the California Civil Code.[322]

Under the public trust doctrine, owners of property along public trust waters are entitled to natural accretions, because "[t]he state has no control over nature; allowing private parties to gain by natural accretion does not harm to the public trust doctrine."[323] In contrast, "to allow accretion caused by artificial means to deprive the state of trust lands would effectively alienate what may not be alienated."[324]

Unlike most states, California has extended its public trust doctrine, beginning in 1971, to the preservation of the natural environment and

316. City of Berkeley v. Superior Court, 606 P.2d 362, 363–67 (Cal. 1980); San Diego County Archeological Soc'y, Inc. v. Compadres, 146 Cal. Rptr. 786, 787–88 (Cal. Ct. App. 1978); People v. Sweetser, 140 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977); Marks v. Whitney, 491 P.2d 374, 378–79 (Cal. 1971).

317. City of Los Angeles v. Venice Peninsula Props., 644 P.2d 792, 793–94 (Cal. 1982) (citing California v. Superior Court (Lyon), 625 P.2d 239 (Cal. 1981); *California v. Superior Court (Fogerty)*, 625 P.2d at 256).

318. *City of Los Angeles*, 644 P.2d at 793–94.

319. *City of Berkeley*, 606 P.2d at 369.

320. *Id.* at 373.

321. Charpentier v. Von Geldern, 236 Cal. Rptr. 223, 239 (Cal. Ct. App. 1987).

322. *Id.* (discussing CAL. CIVIL CODE § 846 (1980)).

323. State *ex rel.* State Lands Comm'n v. Superior Court, 900 P.2d 648, 661–62 (Cal. 1995).

324. *Id.*

ecosystems as well as to public uses of the navigable waters and tidelands. In the 1971 case of *Marks v. Whitney*, the California Supreme Court announced:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary here to define precisely all the public uses which encumber tidelands.[325]

The recognition of the ecological value of submerged lands extends to nontidal submerged lands as well. As the California Supreme Court stated in connection with Lake Tahoe litigation:

> [T]he shorezone has been reduced to a fraction of its original size in this state by the pressures of development. Such lands now cover less than one half of 1 percent of the state; a further reduction by 15 percent was projected for 1980. Some authorities have warned that at the present rate of destruction nearly all riparian vegetation on the Sacramento River could be eliminated in the next 20 years.
>
> The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead, and striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.[326]

Thus, the California public trust doctrine extends to "environmental . . . purposes,"[327] and encompasses "the right to preserve the tidelands in the natural state as ecological units for scientific study."[328]

California courts have also extended the public trust doctrine not just to aquatic wildlife habitat, but also to the wildlife itself.[329] "These are natural

325. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (citations omitted).

326. California v. Superior Court (Fogerty), 625 P.2d 256, 258–59 (Cal. 1981).

327. City of Los Angeles v. Venice Peninsula Props., 644 P.2d 792, 794 (Cal. 1982).

328. City of Berkeley v. Superior Court, 606 P.2d 362, 363 (Cal. 1980) (citing *Marks*, 491 P.2d at 374).

329. Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 596–98 (Cal. Ct. App. 2008) (citing Golden Feather Comty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989)).

resources of inestimable value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions . . . ."[330] Those statutes generally define the contours of the public trust obligation regarding wildlife.[331] Members of the general public can sue to enforce the wildlife public trust as well as the navigable water public trust, because the public trust doctrine "places a *duty* upon the government to protect those resources."[332]

The California Supreme Court clarified in 2008 that California has "two distinct public trust doctrines":

> First is the common law doctrine, which involves the government's "affirmative duty to take the public trust into account in the planning and allocation of water resources . . . ." The second is a public trust duty derived from statute, specifically Fish and Game Code section 711.7, pertaining to fish and wildlife: "The fish and wildlife resources are held in trust for the people of the state by and through the department." There is doubtless an overlap between the two public trust doctrines—the protection of water resources is intertwined with the protection of wildlife. . . . Nonetheless, the duty of government agencies to protect wildlife is primarily statutory.[333]

Given this statutory focus, an incidental take permit did not violate the common-law public trust doctrine.[334]

Public trust interests can extend the state's authority and duties beyond the navigable waters. For example, "[t]he state's right to protect fish is not limited to navigable or otherwise public waters but extends to any waters where fish are habitated or accustomed to resort and through which the have the freedom of passage to and from the public fishing grounds of the state."[335]

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330. *Id.* at 598.

331. *Id.* at 599–600.

332. *Id.* at 600.

333. Envtl. Prot. & Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot., 80 Cal. Rptr. 3d 28, 73 (2008) (quoting Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728–29 (1983)); *see also* Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 138, 212 (Cal. Ct. App. 1989) (establishing that Fish and Game Code § 5946 establishes a public trust rule but noting "that it does not follow from the application of the term 'public trust' to the state's interest in fisheries of non-navigable streams that all of the consequences of the public trust doctrine as applicable to navigable waters also apply to non-navigable streams. For example, the beds of non-navigable streams are not owned by the state based upon a public trust fishery interest.").

334. *Envtl. Prot. & Info Ctr.*, 80 Cal. Rptr. at 74.

335. Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 840 (Cal. Ct. App. 1989); *see also* People v. Truckee Lumber Co., 48 P. 374, 399–400, 400–01 (Cal. 1897) (noting that "the right and power to protect and preserve [fish] for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law" and asserting that the state's authority to protect fish for the public is not limited to fish in navigable waters; "[t]o the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery"); *Cal. Trout*, 255 Cal. Rptr. at 212 (concluding "that a public trust interest pertains to non-navigable streams which sustain a fishery").

Similarly, in *National Audubon Society v. Superior Court*,[336] the California Supreme Court determined that the public trust doctrine could restrict or modify established water rights even in non-navigable tributaries of navigable waters. Withdrawals of water from Mono Lake's tributaries were imperiling "both the scenic beauty and the ecological values of Mono Lake . . . ."[337] As a result, the public trust doctrine could require modifications in the prior appropriation system:

> In our opinions, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. . . . Approval of such diversions with considering public trust values . . . may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions, they should consider the effect of such diversion upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to these interests.[338]

As such, "the public trust doctrine . . . protects navigable waters from harm caused by diversion of non-navigable tributaries."[339] The state retains the authority to review and reconsider water rights when harm becomes evident, particularly if it did not consider public trust values in the original granting of a water right.[340] Moreover, "in determining whether it is 'feasible' to protect public trust values like fish and wildlife in a particular instance, the [State Water Resources Control] Board must determine whether protection of those values, or what level of protection, is 'consistent with the public interest.'"[341] "[W]hen the public trust doctrine clashes with the rule of priority, the rule of priority must yield. [Nevertheless,] every effort must be made to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine," and "the subversion of water right priority is justified only if

336. 658 P.2d 709 (Cal. 1983) (the "Mono Lake case"). For discussions of the Mono Lake dispute, see generally Timothy J. Conway, Note, National Audubon Society v. Superior Court*: The Expanding Public Trust Doctrine*, 14 ENVTL. L. 617 (1984); Kevin M. Raymond, *Protecting the People's Waters: The California Supreme Court Recognizes Two Remedies to Safeguard Public Trust Interests in Water*, 59 WASH. L. REV. 357 (1984); Martha Guy, Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power*, 33 HASTINGS L.J. 653 (1982). For a more recent discussion of subsequent developments, see generally Craig Anthony Arnold, *Litigation's Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1177 (2008).

337. *Nat'l Audubon Soc'y*, 658 P.2d at 711.

338. *Id.* at 712; *see also id.* at 727–28.

339. *Id.* at 721.

340. *Id.* at 728.

341. State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 272 (Cal. Ct. App. 2006) (involving water rights and salmon protection in the Bay Delta).

enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust."[342]

However, the *National Audubon* rule does not apply to water withdrawals from purely non-navigable waters in the absence of an effect on navigable waters.[343] "The public trust doctrine is based upon public access and usage of navigable waters and pursuant to that doctrine the public has an easement and servitude upon such waters. But the public has never had common access and usage of nonnavigable streams . . . ."[344] Similarly, the California courts have declined to extend the *National Audubon* doctrine to groundwater.[345]

While the California public trust doctrine protects a variety of natural resources as well as public uses of water, it does not extend to everything. For example, as a result of California's complicated history, California did not acquire title to—and the public trust doctrine does not apply to—"lands which were the subject of a prior Mexican land grant and later patented by the United States government in accordance with its obligations under the treaty of Guadalupe Hidalgo."[346] Less uniquely, "[t]he public trust doctrine applicable to beaches owned by the sovereign does not apply to hotels located on land which is privately owned. Although hotel owners have certain common law obligations to travelers, hotels are by no means owned in public trust like public beaches."[347] Instead, "[t]he doctrine has been restricted to tidelands, navigable waters, and situations where the government or public in general own the property"—situations where "the state holds or held title because it was important the land be available to all. It does not involve private property except where the state has conveyed the land into private hands. It does not cover artifacts located on private property."[348] The public trust doctrine does not apply to public employment contracts,[349] or to formal trusts.[350]

342. El Dorado Irrigation Dist. v. State Water Res. Control Bd., 48 Cal. Rptr. 3d 468, 489–90 (Cal. Ct. App. 2006).

343. Golden Feather Comty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 839 (Cal Ct. App. 1989).

344. *Id.* at 840; *accord* Hi-Desert County Water Dist. v. Blue Skies Country Club. Inc., 28 Cal. Rptr. 2d 909, 916 n.10 (Cal. Ct. App. 1994).

345. Santa Teresa Citizen Action Group v. City of San Jose, 7 Cal. Rptr. 3d 868, 884 (Cal. Ct. App. 2003); Cal. Water Network v. Castaic Lake Water Agency, Civil Nos. B177978, B181463, 2006 WL 726882, at *11 (Cal. App. Dep't Super. Ct. 2006) (holding that the public trust doctrine does not apply to groundwater or non-navigable waterways, absent some impact on navigable waters).

346. City of Los Angeles v. Venice Peninsula Props., 253 Cal. Rptr. 331, 335 (Cal. Ct. App. 1988); Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 205–09 (1984).

347. Archibald v. Cinerama Hotels, 140 Cal. Rptr. 599, 603 (Cal. Ct. App. 1977).

348. San Diego County Archeological Soc'y, Inc. v. Compadres, 145 Cal. Rptr. 786, 787–89 (Cal. Ct. App. 1978); *see also* Pitt River Tribe v. Donaldson, No. C051902, 2007 WL 1874323, at *7 (Cal. Ct. App. 2007) (holding that a transfer of tribal remains to private parties, when "there is no allegation that the remains in question were located on navigable waters in tidelands," did not constitute a claim under the public trust doctrine).

349. Lucas v. Santa Maria Pub. Airport Dist., 46 Cal. Rptr. 2d 177, 181 (Cal. Ct. App. 1995).

350. Hardman v. Feinstein, 240 Cal. Rptr. 483, 486 n.3 (Cal. Ct. App. 1987).

COLORADO

Date of Statehood: 1876

Water Law System: Prior appropriation

Colorado Constitution: Several provisions of Colorado's constitution relate to water, but the state does not have a constitutionalized public trust doctrine, despite state ballot initiatives in the mid-1990s that repeatedly sought to amend Article XVI, § 5 of the Colorado Constitution to require the state to "adopt and defend a strong public trust doctrine," even for nonnavigable waters.[351] Important water-related and other relevant provisions include:

- Art. IX, § 10: Selection and Management of Public Trust Lands. This section identifies state school lands as public trust lands, to be managed in accordance with Colorado Revised Statutes § 36-1-101.5.
- Art. XVI, § 5: "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."
- Art. XVI, § 6: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."
- Art. XXVII: Great Outdoors Colorado Program. In § 1 of this Article, the Colorado Constitution dedicates lottery money "to the preservation, protection, enhancement and management of the state's wildlife, park, river, trail and space heritage . . . ." Section 2 establishes a trust fund. However, § 7 declares that "[n]othing in this article shall affect in any way whatsoever any of the provisions under Article XVI of the State Constitution of Colorado, including

351. *See, e.g.*, Matter of Title, Ballot Title, Submission Clause, and Summary Adopted April 6, 1994, by Title Board Pertaining to a Proposed Initiative on Water Rights, 877 P.2d 321, 326–29 (Colo. 1994) (en banc) (upholding the initiative); In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995 by the Board Pertaining to a Proposed Initiative "Public Rights in Water II," 898 P.2d 1076, 1078–80 (Colo. 1995) (en banc) (holding the initiative invalid because it contained more than one subject); In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted March 20, 1996, by the Title Board Pertaining to Proposed Initiative "1996-6," 917 P.2d 1277, 1279–82 (Colo. 1996) (en banc) (upholding the initiative).

those provisions related to water, nor any of the statutory provisions related to the appropriation of water in Colorado."

Colorado Statutes:

- COLO. REV. STAT. §§ 37-80-101 to 37-80-120: State Engineer.
- COLO. REV. STAT. §§ 37-81-101 to 37-81-104: Diversion of Waters.
- COLO. REV. STAT. §§ 37-82-101 to 37-82-106: Appropriation and Use of Water.
- COLO. REV. STAT. §§ 37-83-101 to 37-83-106: Exchange of Water.
- COLO. REV. STAT. §§ 37-84-101 to 37-84-125: Responsibility of User or Owner.
- COLO. REV. STAT. §§ 37-85-101 to 37-85-111: Charge for Delivery of Water.
- COLO. REV. STAT. §§ 37-86-101 to 37-86-113: Rights of Way and Ditches.
- COLO. REV. STAT. §§ 37-87-101 to 37-87-125: Reservoirs. Section 37-87-102(1) defines "natural stream" and "ordinary high watermark."
- COLO. REV. STAT. §§ 37-88-101 to 37-88-110: State Canals and Reservoirs.
- COLO. REV. STAT. §§ 37-89-101 to 37-89-104: Offenses.
- COLO. REV. STAT. §§ 37-90-101 to 37-90-143: Underground Water.
- COLO. REV. STAT. §§ 37-92-101 to 37-92-602: Water Right Determination and Administration. Colorado relies on a judicial system rather than a permitting system for its water rights.
- COLO. REV. STAT. §§ 38-6-201 to 38-6-216: Condemnation of Water Rights.

Definition of "Navigable Waters":

Colorado retains a "commercial use" definition of "navigable waters."[352] However, the Colorado Supreme Court has declared most streams in Colorado non-navigable: "the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and . . . no stream of any importance whose source is

352. People v. Emmert, 597 P.2d 1025, 1026 (Colo. 1979).

without those boundaries, flows into or through this state."[353] As a result, there is almost no case law further explicating the definition of "navigable water."

Rights in "Navigable Waters":

Article XVI, § 5, of the Colorado Constitution establishes the state's property right to the water in natural streams.[354] Nevertheless, in a non-navigable river, title to the bed and banks is in the private landowner, giving the landowner exclusive control over the water and the right to exclude recreational users who would like to use the water for floating or fishing.[355]

The Colorado Supreme Court refused to follow the "modern trend"—as represented by Wyoming's interpretation of similar provisions in its constitution—and allow public rights in non-navigable rivers, concluding that Art. XVI, § 5 of the Colorado Constitution does *not* preserve public recreation rights.[356] Instead, "[w]ithout permission, the public cannot use such waters for recreation."[357]

One early case notes that in navigable waters, the riparian landowner owns to the thread, or center, of the stream.[358]

HAWAI'I

Date of Statehood: 1959

Water Law System: Combination of Native Hawaiian rights with elements of both riparianism and prior appropriation

Hawai'i Constitution: "[T]he people of this state have elevated the public trust doctrine to the level of constitutional mandate . . . . We therefore hold that article XI, section 1, and article XI, section 7 adopt the public trust doctrine as a

353. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds*, Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200 (Colo. 1975); *see also* United States v. Dist. Court, 458 P.2d 760, 762 (Colo. 1969) (holding that even though the Eagle River is a tributary of the Colorado River, it is non-navigable).

354. *Stockman*, 129 P. at 222.

355. *Emmert*, 597 P.2d at 1027 (upholding a criminal trespass conviction for floating down a non-navigable river); *see also* Heimbecher v. City & County of Denver, 9 P.2d 280, 281 (Colo. 1932) (noting that the general presumption at common law is that title to land riparian to a non-navigable stream extends to the center of the river); More v. Johnson, 568 P.2d 437, 439 (Colo. 1977) (same).

356. *Emmert*, 597 P.2d at 1027–28.

357. *Id.* at 1029; *see also* Hartman v. Tresise, 84 P. 685, 686–87 (Colo. 1905) (holding that public ownership of the water itself, as stated in the Colorado Constitution, does *not* create a public fishery in non-navigable streams; instead, the private landowner owns the right of fishery, and only appropriative rights can trump this common-law rule).

358. Hanlon v. Hobson, 51 P. 433, 435 (Colo. 1897).

fundamental principle of constitutional law in Hawai'i."[359] The Hawai'i Constitution constitutionalizes many public trust rights, including the traditional public trust doctrine and a water rights public trust. Relevant provisions include:

- Art. IX, § 8: "The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources."
- Art. XI, § 1: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people."
- Art. XI, § 2: "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission."
- Art. XI, § 6: "The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipelagic waters of the State, and reserves to itself all such rights outside state boundaries not specifically limited by federal or international law. All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use."
- Art. XI, § 7: "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people. The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses

359. *In re* Water Use Permit Applications, 9 P.3d 409, 443–44 (Haw. 2000) (citations omitted); *see also* Morgan v. Planning Dep't, 86 P.3d 982, 993 n.12 (Haw. 2004).

and establish procedures for regulating all uses of Hawaii's water resources."

- Art. XI, § 9: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."
- Art. XI, § 11: "The State of Hawaii asserts and reserves its rights and interest in its exclusive economic zone for the purpose of exploring, exploiting, conserving and managing natural resources, both living and nonliving, of the seabed and subsoil, and superadjacent waters."
- Art. XII, § 4: Public Trust: "The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, § 7 of the State Constitution . . . shall be held by the State as a public trust for native Hawaiians and the general public."
- Art. XII, § 5: "There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians."
- Art. XII, § 6: "The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians."
- Art. XII, § 7: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."
- Art. XVI, § 7: Compliance with Trust: "Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by

appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII."

Hawai'i Statutes:

- HAW. REV. STAT. § 7-1: "The people shall have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on lands granted in fee simple . . . ."
- HAW. REV. STAT. § 10-1(a): Incorporates the trust for Native Hawaiians into the Office of Hawaiian Affairs.
- HAW. REV. STAT. § 171-1: The public lands include submerged lands.
- HAW. REV. STAT. § 171-2: This provision defines the public lands.
- HAW. REV. STAT. § 171-3: The Department of Land and Natural Resources "shall manage, administer, and exercise control over public lands, the water resources, ocean waters, navigable streams, coastal areas, and minerals and all other interests therein . . . ."
- HAW. REV. STAT. § 171-18: Public trust lands for schools.
- HAW. REV. STAT. § 171-36(a)(9): The public has the right to use piers.
- HAW. REV. STAT. § 171-53: Reclamation of submerged lands is prohibited without the state's permission.
- HAW. REV. STAT. ch. 174C: State Water Code. Section 174C-2(a) "recognize[s] that the waters of the State are held for the benefit of the citizens of the State" and "declare[s] that the people of the State are beneficiaries and have a right to have the waters protected for their use." In addition, the Code requires the "protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest."[360]
- HAW. REV. STAT. §§ 174C-31 to 174C-32: Hawaii Water Plan. The Commission must "[i]dentify rivers or streams, or a portion of a river or stream, which appropriately may be placed within a wild and scenic rivers system, to be preserved and protected as part of the public trust."[361]

360. HAW. REV. STAT. § 174C-2(c) (2009).
361. *Id.* § 174C-31(c)(4).

- HAW. REV. STAT. § 174C-41 to 174C-63: Regulation of Water Use. Before the State of Hawai'i can regulate water use in a given area, it must designate a water management area.
- HAW. REV. STAT. §§ 174C-66 to 174C-71: Water Quality. These statutes provide protection of instream uses.[362]
- HAW. REV. STAT. § 174C-101: Native Hawaiian Water Rights.
- HAW. REV. STAT. §§ 190D-1 to 190D-36: Oceans and Submerged Lands Leasings.
- HAW. REV. STAT. § 200-6: Permits are required for structures or moorings in ocean waters or navigable streams.
- HAW. REV. STAT. §§ 205A-1 to 205A-71: Coastal Zone Management.

Definition of "Navigable Waters":

The Hawaiian courts are well aware of the convoluted nature of the "navigable waters" definition.[363] "Navigable waters" in Hawai'i include all waters subject to the ebb and flow of the tide, whether navigable or not, and waters that are navigable-in-fact, even if not tidal.[364] Hawai'i has long accepted the tidal test of navigability.[365]

Perhaps because of its water resources trust (see below) and its island nature, Hawai'i does not have well-developed law for non-tidal navigable-in-fact waters. Nevertheless, for public trust purposes, Hawai'i appears to have adopted the pleasure boat test for navigability: "Navigable waters, including both those navigable by larger vessels and those navigable by rowboats and other small craft, are public highways. The right of navigation includes the right to travel on the waters not only for business purposes but also in pursuit of pleasure."[366]

Rights in "Navigable Waters":

Relying on *Illinois Central Railroad*, the Hawai'i Supreme Court declared in 1899 that "[t]he people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use. The lands under the navigable waters in and around the territory of the Hawaiian Government are

362. *Id.* § 174C-71.
363. *In re* Sanborn, 562 P.2d 771, 776 n.6 (Haw. 1977).
364. *Id.*
365. *In re* Bishop, 35 Haw. 608 (Haw. Terr. 1940).
366. Kuramoto v. Hamada, 30 Haw. 841, 845 (Haw. Terr. 1929).

held in trust for the public uses of navigation."[367] Traditionally in Hawai'i, the right of navigation supersedes the right of fishery.[368]

More recently, the Hawai'i Supreme Court has described the public trust as "a dual concept of sovereign right and responsibility."[369] Hawai'i recognizes broad public rights in its waters, noting that "the trust [has] traditionally preserved public rights of navigation, commerce, and fishing. Courts have further identified a wide range of recreational uses, including bathing, swimming, boating, and scenic viewing, as protected trust purposes."[370] Moreover, given Hawaii's history, "the exercise of Native Hawaiian and traditional and customary rights [is] a public trust purpose."[371] In contrast, "the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerate[d] the trust's basic purpose[—]of reserving the resource for use and access by the general public without preference or restriction."[372] Thus, "[a]s commonly understood, the trust protects public waters and submerged lands against irrevocable transfer to private parties, or 'substantial impairment,' whether for private or public purposes . . . ."[373]

"[T]he ultimate authority to interpret and defend the public trust in Hawaii rests with the courts," and "[j]ust as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for dispositions of the public trust."[374] Moreover, "[t]he beneficiaries of the public trust are not just present generations but those to come."[375]

In general, "beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves."[376] Similarly, although "Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage," the boundary designated "ma ke kai" "is along the upper

367. King v. Oahu Ry & Land Co., 11 Haw. 717, 725 (Haw. Terr. 1899) (citations omitted); *see also* Carter v. Territory, 14 Haw. 465, 1902 WL 1419, at *3, *10 (Haw. Terr. 1902) (announcing a public trust for navigation and fishing but allowing exclusive rights of sea fisheries to be acquired by grant or prescription, although the presumption is against the claimant). For a comprehensive examination of Hawaii's public trust doctrine, see generally Denise E. Antolini, *Water Rights and Responsibilities in the Twenty-First Century: A Forward to the Proceedings of the 2001 Symposium on Managing Hawaii's Public Trust Doctrine*, 24 U. HAW. L. REV. 1 (2001); Symposium, *Proceedings of the 2001 Symposium on Managing Hawaii's Public Trust Doctrine*, 24 U. HAW. L. REV. 21 (2001).

368. *Kuramoto*, 30 Haw. at 845.

369. *In re* Water Use Permit Applications, 9 P.3d 409, 448 (Haw. 2000).

370. *Id.* at 448.

371. *Id.* at 449.

372. *Id.* at 450.

373. *In re* Wai'ola O Moloka'i, Inc., 83 P.3d 664, 692 (Haw. 2004) (citations omitted).

374. *Id.* at 684–85.

375. *Id.* at 685.

376. *In re* Sanborn, 562 P.2d 771, 776 n.6 (Haw. 1977).

reaches of the wash of waves, usually evidence by the edge of vegetation or by the line of debris left by the wash of waves . . . ."[377]

The public trust doctrine can invalidate any attempts to extend property boundaries beyond the high-water mark:

> In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below the high water mark. . . . [L]and below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes.[378]

Moreover, because the public has long used the beaches of Hawai'i, that use "has ripened into a customary right. Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[379] Finally, for similar public policy reasons, "lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use, and enjoyment of all the people," and therefore "the State as trustee has the duty to protect and maintain [this] trust property and regulate its use."[380]

Most recently, the Hawai'i Supreme Court has suggested that the public trust doctrine extends to environmental and biodiversity protection. For example, in 2005, it suggested that the public trust doctrine applies, via Article XI, § 1 of the Hawai'i Constitution, to regulation of the Palila, an endangered bird.[381] The following year, it explicitly held that the Department of Health and counties are bound by the public trust doctrine when implementing the federal Clean Water Act. Thus, when environmental groups sued the Department of Health asserting that the Department had violated the public trust doctrine by failing to prevent a developer from violating state water quality standards for coastal waters, the court concluded that state issuance of National Pollutant Discharge Elimination System permits pursuant to the Clean Water Act are subject to the public trust doctrine and that the Department of Health must ensure that water quality measures are actually being implemented.[382] In

377. *In re* Application of Ashford, 440 P.2d 76, 77 (Haw. 1968) (citing Keelikolani v. Robinson, 2 Haw. 514 (Hawaii Terr. 1862)); *see also* Territory v. Kerr, 16 Haw. 363, 1905 WL 1327, at *4 (Haw. Terr. 1905) (holding that grants of property "along the sea" go to the high water mark); *In re Sanborn*, 562 P.2d at 776 n.6 (noting that title to non-tidal navigable-in-fact waters goes to the high-water mark).

378. *In re Sanborn*, 562 P.2d at 776; *see also* Hawaii County v. Sotomura, 517 P.2d 57, 63 (Haw. 1973) (noting that, pursuant to the public trust doctrine, land below the high water mark belongs to the public).

379. *Hawaii County v. Sotomura*, 517 P.2d at 61–62 (citing Oregon *ex rel.* Thorton v. Hay, 462 P.2d 671 (Or. 1969)).

380. Kobayashi v. Zimring, 566 P.2d 725, 735 (Haw. 1977).

381. Morimoto v. Bd. of Land & Natural Res., 113 P.3d 172, 184 (Haw. 2005).

382. Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1009, 1011 (Haw. 2006).

addition, under Article XI, § 1 of the constitution, counties have public trust duties as well, and they "have an obligation to conserve and protect the state's natural resources."[383]

Public trust principles in Hawai'i extend to water rights through a unique water resources trust akin to, but of different origin from, the navigable waters public trust. Emphasizing the 1978 amendments to the Hawai'i Constitution that constitutionalized the public trust doctrine, the Hawai'i Supreme Court has noted that in the Kingdom of Hawai'i, the right to water was reserved to the people for their common good in all land grants, and ownership of the water itself remained at all times in the people.[384] This sovereign reservation imposed a public trust on the water itself, similar to, but different from, the public trust doctrine that arises as a result of state title to the beds and banks of navigable waters.[385]

Given Hawaii's water situation, the reassertion of this traditional water resources trust has been deemed critical, both as against assertions of riparian rights and in light of the State Water Code and water use permits. With respect to riparian rights,

> [t]he reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of these waters. . . . [W]hile there indeed exist relative usufructory rights among landowners, these rights can no longer be treated as though they are absolute and exclusive interests in the waters of our state.[386]

Instead, "underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty."[387]

With respect to the State Water Code:

> The public trust in the water resources of this state, like the navigable waters trust, has its genesis in the common law. . . . The [State Water] Code does not evince any legislative intent to abolish the common law public trust doctrine. To the contrary, . . . the legislature appears to have engrafted the doctrine wholesale in the Code.[388]

As a result, the State Water Code "does not supplant the protections of the public trust doctrine," and "the public trust doctrine applies to all water resources without exception or distinction," including ground waters.[389] In

383. *Id.* at 1004–05.

384. *In re* Water Use Permit Applications, 9 P.3d 409, 441 (Haw. 2000); *see also* Robinson v. Ariyoshi, 658 P.2d 287, 310–11 (Haw. 1982) (giving same history).

385. *In re Water Use Permit Applications*, 9 P.3d at 441; *Robinson*, 658 P.2d at 310 (noting that this sovereign interest was more than just a police power interest; "[t]he nature of this ownership is thus akin to the title held by all states in navigable waterways").

386. *Robinson*, 658 P.2d at 311.

387. *Id.* at 312.

388. *In re Water Use Permit Applications*, 9 P.3d at 443 (citations omitted).

389. *Id.* at 445.

addition, "the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust."[390]

Similarly, "a reservation of water constitutes a public trust purpose."[391] As a result, the Department of Hawaiian Home Land's

> reservations of water throughout the State are entitled to the full panoply of constitutional protections afforded other public trust purposes . . . . To hold otherwise would undermine the public trust doctrine, which is a state constitutional doctrine, and the relevant policy declarations set forth in the [State Water] Code.[392]

"The state water resources trust embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use."[393] Specifically, the state has a "duty to ensure the continued availability and existence of its water resources for present and future generations," but also a "duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state."[394] With respect to the water resources trust, moreover, the Hawai'i Supreme Court explicitly followed California's decision in the Mono Lake case, suggesting that the water resources trust is more protective than the navigable waters public trust doctrine.[395] Indeed, the water resources trust "precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes."[396] As in California, moreover, the state may "revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust."[397] While the Commission may have to balance public and private interests in water,

> the constitutional requirements of 'protection' and 'conservation,' the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the 'zero-sum' game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment . . .[398]

390. *Id.* at 448.

391. *In re* Waiola O Molokai, Inc., 83 P.3d 664, 694 (Haw. 2004).

392. *Id.* (citations omitted); *see also In re* Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc., 174 P.3d 320, 329, 330 (Haw. 2007) (affirming that the public trust doctrine is a constitutional doctrine and the Department of Hawaiian Home Land's water reservations are public trust uses).

393. *In re Water Use Permit Applications*, 9 P.3d at 451.

394. *Id.*

395. *Id.* at 452.

396. *Id.* at 453.

397. *Id.*

398. *Id.* at 454.

Moreover, the Commission's decisions in favor of private commercial uses are subject to "higher scrutiny."[399] Moreover, the Commission must consider the cumulative impacts of diversions and "implement reasonable measures to mitigate this impact, including the use of alternative sources." [400]

IDAHO

Date of Statehood: 1890

Water Law System: Prior appropriation

Idaho Constitution: Idaho has not constitutionalized its public trust doctrine. However, its constitution does establish water rights. Relevant provisions of the Idaho Constitution include:

- Art. XV, § 1: "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law."
- Art. XV, § 3: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water . . . ."
- Art XV, § 7: "[T]he State Water Resource Agency shall have power to formulate and implement a state water plan for optimal development of water resources in the public interest . . . ."

Idaho Statutes: Idaho has codified its public trust doctrine in Idaho Code Annotated §§ 58-1201 to 58-1203, which generally limits the public trust doctrine and its potential impact on appropriated rights. In codifying the doctrine, the Idaho Legislature made the following findings:

> (1) Upon admission of the state of Idaho into the union, the title to the beds of navigable waters became state property, and subject to its jurisdiction and disposal under the equal footing doctrine. According to the United States [S]upreme [C]ourt's decision in *Shively v. Bowlby*, the state has the right to dispose of the beds of navigable waters, "in such manner as [it]

399. *Id.*; *see also In re* Water Use Permit Applications, 93 P.3d 643, 650, 657 (Haw. 2004) (noting that "because water is a public trust resource and the public trust is a state constitutional doctrine, this court recognizes certain qualifications to the standard of review regarding the Water Commission's decisions" and in effect imposes a burden on proposed users to justify their uses of water).

400. *In re Water Use Permit Applications*, 9 P.3d at 455 (citations omitted).

> might deem proper . . . subject only to the paramount right of navigation and commerce." The state has the right to determine for itself "to what extent it will preserve its rights of ownership in them, or confer them on others." *Shively v. Bowlby*, 152 U.S. 1, 56 (1893); and
>
> (2) Since the admission of the state of Idaho into the union, article XV of the constitution of the state of Idaho has governed the appropriation and use of the waters of Idaho. Pursuant to article XV of the constitution of the state of Idaho, the legislature of the state of Idaho has enacted a comprehensive system of laws for the appropriation, transfer and use of the waters of Idaho, which addresses the public interest therein; and
>
> (3) Upon admission of the state of Idaho into the union, the state was granted certain lands by the United States government as an endowment for designated institutions. Article IX of the constitution of the state of Idaho, and laws enacted pursuant thereto [related to public school lands], establish a comprehensive system of laws for the management of state endowment lands, which addresses the public interest therein; and
>
> (4) The common law doctrine known as the public trust doctrine, adopted by inference in section 73-116, Idaho Code, had guided the alienation or encumbrance of the title to the beds of navigable waters held in trust by the state. The public trust doctrine has been used in court decisions and pleadings in ways that have created confusion in the administration and management of the waters and endowment lands; and
>
> (5) The public's interest in the environment is protected in other parts of Idaho's constitution or statutory law; and
>
> (6) The purpose of this act is to clarify the application of the public trust doctrine in the state of Idaho and to expressly declare the limits of this common law doctrine in accordance with the authority recognized in each state to define the extent of the common law.[401]

The legislation goes on to declare that "[t]he public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters as defined in this chapter."[402] Further, "[t]he public trust doctrine shall not be applied to any purpose other than as provided in this chapter,"[403] and it does not apply to "[t]he appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights . . . or any other procedure or law applicable to water rights in the state of Idaho" or to "[t]he protection or

401. IDAHO CODE ANN. § 58-1201 (2009). For discussions of this legislation and its impacts on Idaho's common-law public trust doctrine, see generally Michael C. Blumm, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461 (1997); James M. Kearney, *Recent Statute Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine*, 34 IDAHO L. REV. 91 (1997); Lisa Lombardi, Note, *The Public Trust Doctrine in Idaho*, 33 IDAHO L. REV. 231 (1996).

402. IDAHO CODE ANN. § 58-1203(1).

403. *Id.* § 58-1203(2).

exercise of private property rights within the state of Idaho."[404] Finally, these statutes define "navigable waters" as "those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability" and identify the line of "natural or ordinary high water mark" as the boundary of the beds of navigable waters.[405]

Other relevant statutes in Idaho include:

- IDAHO CODE ANN. § 5-246: No prescriptive easements for overflows are allowed in the beds of navigable waters.
- IDAHO CODE ANN. § 36-1601: This provision defines a "navigable stream" to be "[a]ny stream which, in its natural state, during normal high water, will float cut timber have a diameter in excess of six (6) inches or any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft for pleasure or commercial purposes . . . ."[406] It provides for public use rights in "[n]avigable rivers, sloughs or streams within the meander line or, when not meandered, between the flow lines of ordinary high water thereof, and all rivers, sloughs and streams flowing through any public lands of the state," which "shall be open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation—boating, swimming, fishing, hunting, and all recreational purposes."[407] However, this right of use does not include a right of access over private property, except that the public can portage around irrigation dams and other private obstructions.[408]
- IDAHO CODE ANN. §§ 42-101 to 42-114: Appropriation of Water.
- IDAHO CODE ANN. §§ 42-501 to 42-505: Appropriations by the Bureau of Land Management of the US Department of Interior.
- IDAHO CODE ANN. §§ 42-602 to 42-619: Distribution of Water Among Appropriators.
- IDAHO CODE ANN. §§ 42-701 to 42-715: Headgates and Measuring Devices.
- IDAHO CODE ANN. §§ 42-1101 to 42-1108: Rights of Way.
- IDAHO CODE ANN. §§ 42-1201 to 42-1209: Maintenance and Repair of Ditches.

404. *Id.* § 58-1203(2)(b), (c).
405. *Id.* § 58-1202(1), (3).
406. *Id.* § 36-1601(a).
407. *Id.* § 36-1601(b).
408. *Id.* § 36-1601(c).

- IDAHO CODE ANN. §§ 42-1401 to 42-1418: Water Rights Adjudications.
- IDAHO CODE ANN. §§ 42-1501 to 42-1508: Minimum Stream Flow.
- IDAHO CODE ANN. § 42-3801: "The legislature of the state of Idaho hereby declares that the public health, safety, and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefor has been given as provided in this act."
- IDAHO CODE ANN. § 58-1302: This provision defines a "navigable lake" to be "any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes."[409]

Definition of "Navigable Waters":

By 1916, the Idaho Supreme Court had rejected the English tidal test of navigability in favor of the navigability-in-fact test.[410] Until January 1, 1977, Idaho Code § 36-907 (1976) defined navigability for public fishing purposes to include any stream supporting log or timber floatation during the high water season.[411] This older statute codified the holding of *Mashburn v. St. Joe Improvement Co.*[412] However, on January 1, 1977, Idaho Code § 36-1601 took effect, codifying the Idaho Supreme Court's decision in *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*,[413] which established a log floatation test for *both* state title and public fishing purposes and recognized that this test was less restrictive than the federal test articulated in *The Daniel Ball*[414] and *Utah v. United States*.[415]

Idaho has codified the standard federal title test of "navigable waters"—that is, "those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability"—for its public trust doctrine.[416] Under this test, the

409. *Id.* § 58-1302(a).
410. N. Pac. Railway Co. v. Hirzel, 161 P. 854, 858–59 (Idaho 1916) (adopting McManus vs. Carmichael, 3 Idaho 1 (1856)).
411. Ritter v. Standal, 566 P.2d 769, 770–71 & n.1 (Idaho 1977).
412. 113 P. 92, 95 (Idaho 1911); *see also Ritter*, 566 P.2d at 770-71 (citations omitted).
413. 528 P.2d 1295, 1297–98 & n.1 (Idaho 1974).
414. 77 U.S. (10 Wall.) 557 (1870).
415. 403 U.S. 9 (1971).
416. IDAHO CODE ANN. § 58-1201(3) (2009).

Salmon River is a navigable water and owned by the state,[417] as are the Snake and Clearwater Rivers.[418]

The public retains the right to use a broader category of "navigable streams" that are defined in terms of log floatation and pleasure boating.[419] Finally, Idaho defines a "navigable lake" to be "any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes."[420]

The U.S. Supreme Court has declared that the Snake River in Idaho is navigable.[421] However, as a result of federal reservations, Idaho does *not* have title to the beds of Coeur d'Alene Lake or the St. Joe River; instead, the United States hold title to those two waters in trust for the Coeur d'Alene Tribe.[422]

Rights in "Navigable Waters":

Although some early cases suggested that a landowner owns the beds of non-tidal navigable-in-fact rivers,[423] according to current case law and statutes, a riparian owner on a navigable stream or river or a littoral owner on a navigable lake takes title to the natural or ordinary high water mark.[424] The natural or ordinary high water mark is "the line that water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes."[425]

"'[T]he State owns in trust for the public title to the bed of a navigable water below the OHWM [ordinary high water mark] as it existed at the time the State was admitted into the Union.'"[426] Landowners cannot exclude the public from using dry land below the OHWM, although they retain a concurrent right of access.[427] "Granting the Lakeshore Owners the right to exclude the public from this portion of state lands would be inconsistent with the public trust doctrine," which preserves the beds of navigable waters for public use.[428]

417. Callahan v. Price, 146 P. 732, 734–35 (Idaho 1915).
418. N. Pac. Railway Co. v. Hirzel, 161 P. 854, 859 (Idaho 1916).
419. IDAHO. CODE ANN. § 36-1601(a), (b).
420. *Id.* § 58-1302.
421. Moss v. Ramey, 239 U.S. 538, 544 (1916); Scott v. Lattig, 227 U.S. 229, 242–43 (1913).
422. Idaho v. United States, 533 U.S. 262 (2001).
423. *See Moss*, 95 P. at 514) (citing Johnson vs. Johnson, 95 P. 499 (Idaho 1908)); Ulbright v. Baslington, 119 P. 292, 293–94 (Idaho 1911).
424. *In re* Sanders Beach, 147 P.3d 75, 85 (Idaho 2006) (citing West v. Smith, 511 P.2d 1326, 1330 (Idaho 1973)); IDAHO CODE ANN. § 58-1202(1).
425. IDAHO CODE ANN. §§ 58-104(9), 58-1202(2); Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 17 P.3d 260, 264 (Idaho 2000).
426. *In re Sanders Beach*, 147 P.3d at 85 (quoting Erickson v. Idaho, 970 P.2d 1, 3 (Idaho 1998)).
427. *Id.*
428. *Id.* (citing Callahan v. Price, 146 P. 732, 735 (Idaho 1915); *Idaho Forest Indus.*, 733 P.2d at 737).

Moreover, "[t]he public trust doctrine is based upon common law equitable principles," and:

> While those equitable principles in certain circumstances may no longer apply to public trust property which has lost its navigable status naturally, it may well be that a loss of navigability resulting from a manmade dike or diversion may not, for equitable reasons, eliminate or destroy the public trust status of land which was once subject to that trust.[429]

Similarly, public rights in a navigable river follow any artificial raising of the river level.[430]

Illinois Central Railroad established the principle that the state may not abdicate its role as trustee of the lands beneath navigable waters to private parties.[431] In the statutory public trust doctrine enacted in 1996, the Idaho Legislature preserved this primary focus and principle of the public trust.[432] Public trust lands conveyed to private parties by the Department of State Lands are limited by that principle and remain subject to the public trust.[433] "The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."[434] As such, the public trust doctrine creates both procedural and judicial review requirements. Procedurally, "public trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon."[435] Judicially, the courts make the final determination as to whether a conveyance is valid, taking a close look at the agency's decision:

> [T]he court will examine, among other things, such factors as the degree of the effect of the project on public trust uses, navigation, fishing, recreation, and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resources is suited, *i.e.*, commerce, navigation, fishing, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.[436]

429. *Idaho Forest Indus.*, 733 P.2d at 738 (citing Rutledge v. Idaho, 482 P.2d 515 (Idaho 1981)).
430. Burrus v. Edward Rutledge Timber Co., 202 P. 1067, 1068 (Idaho 1921).
431. Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983).
432. IDAHO CODE ANN. § 58-1203(1) (2009).
433. *Kootenai Envtl. Alliance*, 671 P.2d at 1095.
434. *Id.*
435. *Id.* at 1091.
436. *Id.* at 1092–93.

Nevertheless, the state has the burden to prove its title by clear and convincing evidence if the state is not the record title holder.[437] Moreover, "[t]here is no 'public trust doctrine' relating to land which is wholly independent or unconnected with such navigable waters."[438] In addition, the public trust doctrine does not apply to private property traceable to an 1892 patent from the United States government.[439]

Although public rights were initially limited to navigation and incidents of navigation, such rights have expanded in Idaho to include fish and wildlife habitat, recreation, aesthetic beauty, and water quality.[440]

By statute, the public trust doctrine does not apply to water rights.[441] This law, enacted in 1996, invalidates a line of cases that had indicated that "proprietary rights to use water . . . are held subject to the public trust."[442]

KANSAS

Date of Statehood: 1861

Water Law Regime: Prior appropriation

Kansas Constitution: Kansas has not constitutionalized its public trust doctrine. Indeed, there are no provisions in the Kansas Constitution relevant to water.

Kansas Statutes:

- KAN. STAT. ANN. §§ 82a-201 to 82a-218: Navigable Waters. If there is a sudden (avulsive) change in a navigable river, the Secretary of State must buy or condemn the new channel.[443] The state will acquire ownership to the high water mark.[444] The state can also convey the old channel.[445]
- KAN. STAT. ANN. §§ 82a-701 to 82a-773: Kansas Water Appropriation Act. "All water within the State of Kansas is hereby

437. Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 17 P.3d 260, 264 (Idaho 2000).

438. *Idaho Forest Indus.*, 733 P.2d at 737.

439. State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1102 (Idaho 1979).

440. *In re* Sanders Beach, 147 P.3d 75, 85 (Idaho 2006); *Idaho Forest Indus.*, 733 P.2d at 737; *Kootenai Envtl. Alliance*, 671 P.2d at 1093.

441. IDAHO CODE ANN. § 58-1203(2)(b) (2009).

442. Idaho Conservation League, Inc. v. Idaho, 911 P.2d 748, 750 (Idaho 1995); *Kootenai Envtl. Alliance*, 671 P.2d at 1094 (holding that "the public trust doctrine takes precedence even over vested water rights").

443. KAN. STAT. ANN. § 82a-201 (2009).

444. *Id.* § 82a-202.

445. *Id.* § 82a-205.

> dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed."[446] The act allows for minimum streamflows and a permit system.[447] The act also addresses conservation plans and practices,[448] and establishes a water bank.[449]

Definition of "Navigable Waters":

Kansas courts have recognized that, under the English tidal test of navigability, three categories of waters existed: the non-navigable waters; intermediate waters, whose beds were in private ownership but whose waters are subject to public rights of use; and the navigable waters subject to the ebb and flow of the tide, whose beds belong to the Crown.[450] Nevertheless, in the United States, the American navigable-in-fact test governs, and the ancient tidal test was never part of Kansas common law.[451]

Thus, for state title and public trust doctrine purposes, the Kansas courts apply the federal title test of navigability. According to those courts,

> Under this test, bodies of water are navigable and title to the beds under the water are vested in the State if: (1) the bodies of water were used, or were susceptible of being used, as a matter of fact, as highways for commerce; (2) such use for commerce was possible under the natural conditions of the body of water; (3) commerce was or could have been conducted in the customary modes of trade or travel on water; and (4) all of these conditions were satisfied at the time of statehood.[452]

Older cases, however, allowed the establishment of navigability by judicial notice, "at least so far as the great rivers are concerned."[453] Moreover, lack of

446. *Id.* § 82a-702.

447. *Id.* §§ 82a-703a to 82a-703c.

448. KAN. STAT. ANN. § 82a-733.

449. *Id.* § 82a-763.

450. State *ex rel.* Meek v. Hays, 785 P.2d 1356, 1359 (Kan. 1990); Wood v. Fowler, 26 Kan. 682, 689 (1882).

451. Kansas v. Akers, 140 P. 637, 645–49 (Kan. 1914); *Wood*, 26 Kan. at 689.

452. *Meek*, 785 P.2d at 1359 (citing United States v. Holt Bank, 270 U.S. 49, 55–56 (1926)); *see also* Hurst v. Dana, 122 P. 1041, 1042 (Kan. 1911) (noting that "any water to be navigable should be susceptible of use for purposes of commerce or possess the capacity for valuable floatage in transportation to market of the products of the country through which it runs, and should be of practical usefulness to the public as a public highway in its own state and without aid of artificial means; that a theoretical or potential navigability or one that is temporary, precarious and unprofitable, is not sufficient"); Kregar v. Fogarty, 96 P. 845, 846–47 (Kan. 1908) (noting that navigability is a question of fact determined through the federal commerce test; meandering is not dispositive).

453. *Wood*, 26 Kan. at 689 (addressing the navigability of the Kansas River); *Hurst*, 122 P. at 1042 (addressing the Arkansas River).

use does not affect state title to a river that is navigable-in-fact.[454] There is no state common law test of navigability in Kansas.[455]

Applying the federal test, the Kansas Supreme Court determined that Shoal Creek was non-navigable.[456] The court emphasized that the creek did not allow for any valuable floatage, that it dries up, and that parts of the creek are not navigable even by canoes.[457] Similarly, the Neosho River was not navigable even though it could support log floatation and light boats over short distances; it was never used to transport the products of the country.[458]

By 1990, three rivers in Kansas had been declared navigable for title purposes: the Kansas River, the Arkansas River, and the Missouri River.[459] Three rivers had been declared non-navigable: the Neosho River, the Delaware River, and the Smoky Hill River.[460]

Rights in "Navigable Waters":

For navigable streams, the riparian landowner owns "only to the banks."[461] In contrast, landowners along non-navigable streams own the bed of the stream and may put a fence across the stream to stop trespassing canoeists.[462] "Navigable waters and public waters are synonymous terms. This state claims title to the beds of public streams only. The title to the beds of all other streams is in the riparian owner."[463]

In navigable waters, both riparian owners and the general public have rights; "[t]he stream is a public highway, and no one can maintain an exclusive privilege to any part of the water."[464] Public rights include the right to take ice.[465] Moreover:

> The title of the state to the bed of a meandered stream is not an absolute fee, which the state can dispose of as it wishes; but such title is vested in it in trust for the benefit and common right of all the people, for the purposes for which such property has been used from time immemorial, viz; the common right of passage, of fishing, of the use of the waters for domestic,

454. *Hurst*, 122 P. at 1043.
455. Siler v. Dreyer, 327 P.2d 1031, 1033 (Kan. 1958).
456. *Meek*, 785 P.2d at 1360.
457. *Id.*
458. Webb v. Bd. of Comm'rs of Neosho County, 257 P. 966, 966 (Kan. 1927).
459. *Meek*, 785 P.2d at 1360 (citing Kansas v. Akers, 140 P. 637 (Kan. 1914); *Hurst*, 122 P. at 1041; Wood v. Fowler, 26 Kan. 682 (1882)).
460. *Id.* (citing Webb v. Neosho County Commissioners, 257 P. 966 (Kan. 1927); Piazzek v. Drainage Dist., 237 P. 1059 (Kan. 1925); Kreger v. Fogarty, 96 P. 845 (Kan. 1908)).
461. *Id.* at 1358; *Kregar*, 96 P. at 847.
462. *Meek*, 785 P.2d at 1358; *Kregar*, 96 P. at 848 (noting that title in non-navigable waters goes to the thread of the stream).
463. *Piazzek*, 237 P. at 1060.
464. *Wood v. Fowler*, 26 Kan. 682, WL 910 at *2.
465. *Id.*

> agricultural, and commercial purposes, and therefore the state has no proprietary right in the bed of the stream or in the water which it can sell.[466]

In addition, private persons cannot acquire prescriptive rights in these assets against the public.[467]

In 1990, the Kansas Supreme Court refused to extend public trust concepts to non-navigable streams based on state ownership of the water and § 82a-702 of the Kansas statutes.[468]

> Owners of the bed of a nonnavigable stream have the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions, and regulations. Where the legislature refuses to create a public trust for recreational purposes in nonnavigable streams, courts should not alter the legislature's statement of public policy by judicial legislation.[469]

As a result, "[t]he public has no right to the use of nonnavigable water overlying private lands for recreational purposes without the consent of the landowner."[470]

MONTANA

Date of Statehood: 1889

Water Law System: Prior appropriation

Montana Constitution: The Montana Constitution has several provisions related to water, public access, and environmental protection that the Montana courts have deemed relevant to Montana's public trust doctrine.[471] These and other relevant provisions include:

- Preamble: "We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations to ordain and establish this constitution."
- Art. IX, § 1: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[472] "The legislature shall provide for the

466. Kansas v. Akers, 140 P. 637, 640 (Kan. 1914).
467. *Id.* at 650.
468. State *ex rel.* Meek v. Hays, 785 P.2d 1356, 1364 (Kan. 1990).
469. *Id.* at 1364–65.
470. *Id.* at 1365.
471. *See, e.g.*, *In re* Adjudication of the Existing Rights to Use of all Water, 55 P.3d 396, 404 (Mont. 2002) (linking the Constitution to the public trust doctrine).
472. MONT. CONST., art. IX, § 1(1) (1972).

administration and enforcement of this duty."[473] "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."[474]

- Art. IX, § 3: "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."[475] "The use of all water that is now or may hereafter be appropriated for sale, rent, distribution or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use."[476] "All surface, underground, flood, and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[477] "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."[478]
- Art. IX, § 4: "The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archeologic, scientific, cultural, and recreational areas, sites, records, and objects, for their use and enjoyment by the people."
- Art. IX, § 7: "The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right of trespass on private property or diminution of other private rights."

Montana Statutes:

- MONT. CODE ANN. §§ 23-2-301 to 23-2-322: Recreational Use of Streams. These provisions define "ordinary high-water mark" to be "the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and

473. *Id.* § 1(2).
474. *Id.* § 1(3).
475. *Id.* § 3(1).
476. *Id.* § 3(2).
477. *Id.* § 3(3).
478. *Id.* § 3(4).

destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks."[479] Recreational uses of surface waters include "fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses."[480] "'Surface water' means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark."[481] While codifying public recreational rights, these provisions ensure that title to land is not affected by public access,[482] and that the public can acquire no prescriptive easements as a result of its recreational use of surface waters.[483] Moreover, the rights do not apply to lakes.[484] These provisions also restrict riparian landowners' liability.[485] However, the provisions do allow the public rights to portage above the high-water mark.[486]

- MONT. CODE ANN. § 75-5-705: Nothing in the state's water quality laws and water quality assessment provisions "may be construed to divest, impair, or diminish any water right recognized pursuant to Title 85."
- MONT. CODE ANN. § 75-7-104: Provisions for the protection of streambeds "shall not impair, diminish, divest or control any existing or vested water rights under the laws of the state of Montana or the United States."
- MONT. CODE ANN. § 85-1-111: "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation. This section shall not be construed so as to affect or impair, in any manner, any rights acquired prior to July 1, 1901, by any person, association of persons, or corporation. The right of any person, association of persons, or corporation to take and use any water, as now provided by law, from any stream or streams for the purpose of irrigation or any beneficial or industrial pursuit shall not be abridged."
- MONT. CODE ANN. § 85-1-112: "All lakes wholly or partly within this state which have been meandered and returned as navigable by

479. MONT. CODE ANN. § 23-2-301 (2009).
480. *Id.* § 23-2-301(10).
481. *Id.* § 23-2-301(12).
482. *Id.* § 23-2-309.
483. *Id.* § 23-2-322.
484. *Id.* § 23-2-310.
485. *Id.* § 23-2-321.
486. *Id.* § 23-2-311.

the surveyors employed by the government of the United States and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable streams or public waters."[487] "All rivers and streams which have been meandered and returned as navigable by surveyors employed by the government of the United States and all rivers and streams which are navigable in fact are hereby declared navigable."[488]

- MONT. CODE ANN., Title 85, Chapter 2: Surface Water and Ground Water. This chapter provides for water rights adjudications; appropriations, permits, and certificates of water rights; utilization of water; and Indian and federal water rights.
- MONT. CODE ANN., Title 85, Chapter 7: Irrigation Districts.
- MONT. CODE ANN. § 85-16-102: "All docks and wharves built on any of the navigable waters of the state shall be public docks and wharves, and all boats, vessels, and steamboats plying such navigable waters shall have a right to land thereat and take on and discharge their cargoes and passengers thereon. The owner of such dock or wharf shall have the right to charge and collect from the owner or owners of such boat, steamboat, or vessel a reasonable compensation therefor."
- MONT. CODE ANN. § 85-16-107: With respect to land under a navigable water, state ownership extends to the high water mark or meander line.
- MONT. CODE ANN., Title 85, Chapter 20: Water Compacts.
- MONT. CODE ANN. § 87-2-305: "Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams and the land between high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose."

Definition of "Navigable Waters":

Early on, the Montana Supreme Court rejected the common law "ebb and flow" tidal rule of navigability in favor of the navigable-in-fact test.[489] For

487. *Id.* § 85-1-112(1).
488. *Id.* § 85-1-112(2).
489. Gibson v. Kelly, 39 P. 517, 519 (Mont. 1895).

purposes of state title to the beds and banks, Montana uses a federal test of navigability based on *The Daniel Ball* and *The Montello*.[490] However, in the Montana Supreme Court's interpretation, this is essentially a log floatation test. For example, evidence that the Dearborn River was used in 1887 to float approximately 100,000 railroad ties, and used in 1888 and 1889 to float log drives supported a finding that the river was navigable for state title purposes.[491] State ownership of the bed also gives the state ownership of minerals contained therein.[492]

Nevertheless, "where title to the bed of [a river] rests within the State, the test of navigability for *use* and not for title, is a test to be determined under state law and not federal law."[493] In its case law relying on the Montana Constitution, the Montana Supreme Court has employed a broad "recreational use" test to determine which waters are subject to public use. Specifically,

> the capability of use of the waters for recreational purposes determined whether the waters can be so used. The Montana Constitution clearly provides that the State owns the waters for the benefit of its people. The Constitution does not limit the waters' use. Consequently, this Court cannot limit their use by inventing some restrictive test.[494]

By statute, for purposes of public use rights, streams and lakes in Montana are navigable if they are navigable in fact under a commerce definition or meandered and returned as navigable by federal surveyors.[495] In addition, the public has a right to fish in any waters that flow through public lands.[496]

According to the U.S. Supreme Court, the Big Horn River is navigable and Montana owns its beds and banks.[497]

Rights in "Navigable Waters":

The line between private and state ownership of the beds of navigable waters is the high-water mark or meander line.[498] However, under older

490. Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 166 (Mont. 1984).

491. *Id.*; *see also* Edwards v. Severin, 785 P.2d 1022, 1023–24 (Mont. 1990) (concluding that the Yellowstone River is a navigable river because it could float logs).

492. Jackson v. Burlington N., Inc., 667 P.2d 406, 408 (Mont. 1983).

493. *Mont. Coal. for Stream Access v. Curran*, 682 P.2d at 168.

494. Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984) (rejecting both the federal navigability and "pleasure boat" tests for public rights); *see also Mont. Coal. for Stream Access v. Curran*, 682 P.2d at 169 (recreational use and fishing can make a stream navigable for public use purposes, and "[s]treambed ownership by a private party is irrelevant," overruling Herrin v. Sutherland, 241 P. 328 (Mont. 1925), which held that persons who waded a non-navigable creek had committed a trespass, on the grounds that that holding "was contrary to the public trust doctrine and the 1972 Montana Constitution").

495. MONT. CODE ANN. §§ 85-1-111, 85-1-112 (2009).

496. MONT. CODE ANN. § 87-2-305.

497. Montana v. United States, 450 U.S. 544, 553–57 (1981).

statutes, riparian landowners on navigable streams took title to the low water mark, while landowners along non-navigable waters took title to the middle of the stream or lake.[499] Neveertheless, even under these cases, public rights extended to the high water mark.[500]

"The public has the right to use the waters and the bed and banks up to the high water mark," including portage "in the least intrusive manner possible."[501]Moreover, "[u]nder the Constitution *and* the public trust doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters.[502] However, this right does not give the public access rights over private property.[503] Early rights recognized included the rights to fish and to shoot wild ducks.[504]

Montana is one of the western states that has used public ownership of water to extend public trust rights to non-navigable waters. Thus, the Montana Supreme Court has emphasized that "[t]he public trust doctrine in Montana's Constitution grants public ownership in *water* not in beds and banks of streams."[505] Moreover, "[t]he Montana Constitution makes no distinction between Class I and Class II waters. *All* waters are owned by the State for the use of its people."[506] As a result, "the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water," even if the bed and banks are privately owned.[507] "The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself. We hold that

498. MONT. CODE ANN. § 85-16-107; Galt v. Mont. Dep't of Fish, Wildlife, & Parks, 731 P.2d 912, 915 (Mont. 1987).

499. Montgomery v. Gehring, 400 P.2d 403, 405 (Mont. 1965) (citing MONT. REV. CODE. § 67-712 (1947)); *see also* Faucett v. Dewey Lumber Co., 266 P. 646, 648 (Mont. 1928) (noting that under MONT. REV. CODE § 6771 (1921), landowners along navigable waters took title to the low-water mark); *Herrin*, 241 P. at 331 (same); Gibson v. Kelly, 39 P. 517, 519 (Mont. 1895) (noting that the boundary between public and private ownership is the low water mark, based on CIV. CODE § 772 (1895)).

500. *Gibson*, 39 P. at 519–20 (recognizing public rights of fishing and navigation to this mark).

501. Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984).

502. *In re* Adjudication of the Existing Rights to Use All the Water, 55 P.3d 396, 404 (Mont. 2002). For a more detailed discussion of recreational use rights in Montana, see generally Sarah K. Stauffer, *The Row on the Ruby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana*, 30 ENVTL. L. 1421 (2006).

503. *Mont. Coal. for Stream Access v. Hildreth*, 684 P.2d at 1091.

504. *Herrin*, 241 P. at 331.

505. Galt v. Montana Dep't of Fish, Wildlife, & Parks, 731 P.2d 912, 915 (Mont. 1987) (emphasis added).

506. *Id.*

507. *Id.*; *Mont. Coal. for Stream Access v. Hildeth*, 684 P.2d at 1092 (noting that underlying ownership of the bed does not matter for the public's recreational use right); Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) (holding that "under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes").

any use of the bed and banks must be of minimal impact."[508] Nevertheless, Montana statutes make it clear that appropriated water rights trump any other public interest in the waters, including environmental protections and public use rights.[509]

Montana statutes codify public rights of recreation, navigation, and fishing in the navigable and public surface waters.[510] Given the statutory limitations regarding "surface waters" and "natural" waters in § 23-2-301 of the Montana Code, recreational rights in artificial lakes are limited.[511]

NEBRASKA

Date of Statehood: 1867

Water Law System: Prior appropriation, although some riparian rights remain[512]

Nebraska Constitution: Nebraska's constitution contains several provisions relating to water. These include:

- Art. XV, § 4: Water a Public Necessity. "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."
- Art XV, § 5: "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section."
- Art. XV, § 6: This section establishes the right to divert unappropriated waters, subject to a public interest limitation and a preference for domestic use, followed by a preference for agriculture.
- Art. XV, § 7: This section declares that the appropriation of water for power uses is a public purpose.

Nebraska Statutes:

- NEB. REV. STAT. § A1-105: South Platte River Compact.
- NEB. REV. STAT. § A1-106: Republican River Compact.

508. *Galt*, 731 P.2d at 915; *Mont. Coal. for Stream Access v. Curran*, 682 P.2d at 172.
509. MONT. CODE ANN. §§ 75-5-705, 75-7-104, 85-1-111 (2009).
510. *Id.* §§ 23-2-301 to 23-2-322, 85-1-111, 85-1-112, 85-16-102, 87-2-305.
511. Ryan v. Harrison & Harrison Farms, L.L.P., No. 00-395, 2001 WL 828068, at *4 (Mont. 2001).
512. Koch v. Aupperle, 737 N.W.2d 869, 878 (Neb. 2007); Wasserman v. Coffee, 141 N.W.2d 738, 744–45 (Neb. 1966).

- NEB. REV. STAT. § A1-110: Nebraska-South Dakota-Wyoming Water Compact.
- NEB. REV. STAT. § A1-111: Nebraska-Kansas Water Compact Commission.
- NEB. REV. STAT. § A1-112: Wyoming-Nebraska Compact on Upper Niobrara River.
- NEB. REV. STAT. § A1-114: Missouri-Nebraska Boundary Compact. Article VII(b) of the Compact prohibits the states from claiming the beds of the Missouri River against private landowners.
- NEB. REV. STAT. § A1-115: Blue River Basin Compact.
- NEB. REV. STAT. § A1-123: South Dakota-Nebraska Boundary Compact. Article VII(b) of the Compact prohibits the states from claiming the beds of the Missouri River against private landowners.
- NEB. REV. STAT., Chapter 46: Irrigation and Regulation of Water. This chapter provides for water rights adjudications and ground water regulation.

Definition of "Navigable Waters":

In 1906, the Nebraska Supreme Court observed the variations among the states regarding what constituted "navigable waters" and blamed the "confusion" on a variety of factors.[513] Noting that Nebraska had adopted English common law, the court rejected the navigable-in-fact test for title as a mistake and adhered instead to the common law ebb-and-flow tidal test—even for the Missouri River.[514] Despite holding that Nebraska lacked title in the Missouri River, the court explained that "[t]he public retains its easement of the right of passage along and over the waters of the river as a public highway. This is the interest of the public in connection with such rivers which is paramount, and which is, and should be, protected by the courts."[515]

Rights in "Navigable Waters":

A landowner along navigable or non-navigable waters "owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands."[516] "The only difference is that in the case of a navigable

513. Kinkead v. Turgeon, 109 N.W. 744, 744 (Neb. 1906).

514. *Id.* at 745–47.

515. *Id.* at 747. *But see* Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 64 N.W. 239, 240–41 (Neb. 1895) (accepting the navigable-in-fact test but nevertheless finding that the Republican River was not navigable).

516. Monument Farms, Inc. v. Daggett, 520 N.W.2d 556, 561–62 (Neb. Ct. App. 1994); Krumwielde v. Rose, 129 N.W.2d 491, 496 (Neb. 1964).

stream, such as the Missouri River, it is subject to the superior easement of navigation."[517] Further,

> [t]he interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a private road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement.[518]

Apart from this, neither the courts nor the legislature have comprehensively developed Nebraska's public trust law.

NEVADA

Date of Statehood: 1864

Water Law System: Prior appropriation

Nevada Constitution: There are no provisions relevant to water in the Nevada Constitution.

Nevada Statutes:

- NEV. REV. STAT. § 202.450: Nuisance includes befouling, obstructing, or rendering dangerous for passage "a lake, navigable river, bay, stream, canal, ditch, millrace, or basin . . . ."
- NEV. REV. STAT. § 322.0052: This provision defines a littoral or riparian residential parcel.
- NEV. REV. STAT. § 455B.420: "'Water access area' includes, without limitation, a beach, river entry or exit point and land located at or below the ordinary high-water mark of a navigable body of water within this state."
- NEV. REV. STAT., Title 48, Chapter 532: State Engineer.
- NEV. REV. STAT., Title 48, Chapter 533: Adjudication of Vested Water Rights; Appropriation of Public Waters. "The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public."[519] These provisions also declare that recreational use of the waters is a beneficial use.[520]

517. *Krumwielde*, 129 N.W.2d at 496 (citing Kinkead v. Turgeon, 109 N.W. 744 (Neb. 1906)).
518. *Kinkead*, 109 N.W. at 747.
519. NEV. REV. STAT. § 533.025 (2008).
520. *Id.* § 533.030(2).

- NEV. REV. STAT., Title 48, Chapter 534: Underground Water and Wells.
- NEV. REV. STAT., Title 48, Chapter 535: Dams and Other Obstructions.
- NEV. REV. STAT., Title 48, Chapter 536: Ditches, Canals, Flumes, and Other Conduits.
- NEV. REV. STAT., Title 48, Chapter 537: Navigable Waters. This chapter lists specific waters that the State of Nevada considers navigable for title purposes. Thus, "[a]ll of the Colorado River within the State of Nevada, from the Arizona line on the north to the California line on the south, is hereby declared to be a navigable stream for purposes of fixing ownership on the banks and beds thereof, and title to the lands below the high water mark thereof is held by the State of Nevada, insofar as they lie within the state."[521] Similarly, the Virgin River and Winnemuca Lake are navigable waters, with title to their beds and banks in the State of Nevada.[522]
- NEV. REV. STAT., Title 48, Chapter 538: Interstate Waters, Compacts, and Commissions. The Colorado River Compact is codified at § 538.010.
- NEV. REV. STAT., Title 48, Chapter 539: Irrigation Districts.
- NEV. REV. STAT., Title 48, Chapter 540: Planning and Development of Water Resources.
- NEV. REV. STAT., Title 48, Chapter 540A: Regional Planning and Management.
- NEV. REV. STAT., Title 48, Chapter 541: Water Conservancy Districts.
- NEV. REV. STAT., Title 48, Chapter 543: Control of Floods.
- NEV. REV. STAT., Title 48, Chapter 544: Modification of Weather.

Definition of "Navigable Waters":

In Chapter 537, Nevada's statutes declare certain waters to be navigable for title purposes, including the Colorado River, the Virgin River, and Winnemuca Lake.[523] These statutes are effectively treated as conclusive determinations of navigability for title purposes.[524]

521. *Id.* § 537.010.

522. *Id.* §§ 537.020, 537.030.

523. NEV. REV. STAT. § 537 (2008).

524. *See* State Eng'r v. Cowles Bros, Inc., 478 P.2d 159, 160 (Nev. 1970) (concluding that, because Winnemuca Lake went dry naturally and gradually, the court would normally have declared it non-navigable for title purposes, but for the declaration of navigability in NEV. REV. STAT. § 537.030 (1921)).

However, Chapter 537 does not provide a complete list of the navigable waters in Nevada, and outside of these statutory declarations, the Nevada courts use the federal test for navigability and recognize that the U.S. Supreme Court has established different navigability tests for Commerce Clause and state title purposes.[525] For state title purposes, the water must be navigable as of the date of statehood.[526] Moreover, "[a] body of water is navigable if it is used or is usable in its ordinary condition, as a highway of commerce over which trade and travel are or may be conducted."[527] Nevertheless, the Nevada Supreme Court has interpreted the federal title test to be a log floatation test, concluding that:

> [a]lthough no Supreme Court case has expressly based its decision of title navigability on the capacity of a stream to float out logs, the emphasized portions of . . . *The Montello* and *Appalachian Power* leads us to believe that in the setting of this case navigability for title has been established. Log driving was the first and apparently only important commercial use of the Carson. The river was fortuitously and ideally located geographically for this use. The Carson River was and is navigable.[528]

Moreover, Nevada courts have noted that the Supreme Court allows states to use less stringent tests for navigability to define allowable public uses.[529]

Rights in "Navigable Waters":

The Nevada Supreme Court has noted that "the states hold title to the beds of navigable watercourses in trust for the people of their respective states. Title to navigable water beds are normally inalienable."[530] As a result, in the absence on an express legislative determination to convey these submerged lands, it is presumed that state land patents did *not* convey them.[531]

Early case law indicates that private landowners own to the low water mark of navigable waters.[532] However, if the title describes a meander line, the landowner takes only to that meander line or high water line.[533]

525. State v. Bunkowski, 503 P.2d 1231, 1233, 1235–36, 1238 (Nev. 1972).

526. *State Eng'r*, 478 P.2d at 160.

527. *Id.* (citing Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922)).

528. *Bunkowski*, 503 P.2d at 1236; *see also* Shoemaker v. Hatch, 13 Nev. 261, 267 (1878) (concluding that the Truckee River is navigable because it is "a highway for the floatage of wood and timber, and has been treated by the officers of the government as a navigable stream").

529. *Bunkowski*, 503 P.2d at 1235.

530. *Id.* at 1233, 1235–36, 1238.

531. *Id.*

532. *Shoemaker*, 13 Nev. at 267.

533. Michelsen v. Harvey, 822 P.2d 660, 662 (Nev. 1991); Reno Brewing Co. v. Pacjard, 103 P. 415 (Nev. 1909).

Nevada's case law on its public trust doctrine is quite limited. Indeed, one writer has declared that "Nevada remains the only western state that has not addressed the public trust doctrine."[534]

Nevertheless, as in many western states, the issue of the relationship between appropriative water rights and the public trust doctrine *has* arisen in Nevada, although the courts have largely side-stepped the issue.[535] The Nevada Supreme Court has discussed the public trust doctrine in the water rights context, however, stating that:

> Under the Public Trust Doctrine, the state government, as trustee of all public natural resources, owes a fiduciary obligation to the general public to maintain public uses unless an alternative use would achieve a countervailing public benefit. Thus, the Public Trust Doctrine serves to protect public expectations in natural resources held in common against destabilizing change.[536]

Moreover, the State Engineer's

> refusal to consider alternatives to the [water] project is not consistent with the exercise of his functions as the trustee of water resources in Nevada and his responsibility to insure that 'all sources of water supply within the . . . state whether above or beneath the surface of the ground' is managed as an asset belonging to the public. In refusing to consider any of the alternatives presented by the protestants to the use proposed by the applicants, the State Engineer has violated his trust and has failed to consider adequately the public's interest in its water resources.[537]

As in Montana, the statutory declaration of public ownership of Nevada's water may yet influence its public trust doctrine. In 1997, the Nevada Supreme Court declared that "the most fundamental tenet of Nevada water law [is that] '[t]he water of sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, *belongs to the public*.'"[538] In addition, at least one justice of the Nevada Supreme Court has expressed a willingness to consider "the existence and role of the public trust doctrine in the State of Nevada," noting that in other states the doctrine has evolved to include recreational and ecological uses and emphasizing the public ownership of water in Nevada.[539] According to Justice Rose, "[t]his extension of the doctrine is

534. John P. Sande IV, *A River Runs to It: Can the Public Trust Doctrine Save Walker Lake?*, 44 SANTA CLARA L. REV. 831, 833 n.15 (2004).

535. *See, e.g.*, Mineral County v. Nev. Dep't of Conservation & Natural Res, 20 P.3d 800, 807 n.35 (Nev. 2001) (avoiding the issue of how the public trust doctrine would apply to water rights affecting Walker River on procedural grounds).

536. Pyramid Lake Paiute Tribe of Indians v. Washoe County, 918 P.2d 697, 709 n.7 (Nev. 1996) (citations omitted).

537. *Id.* at 709 (quoting NEV. REV. STAT. § 533.025).

538. Desert Irrigation, Ltd. v. State, 944 P.2d 835, 842 (Nev. 1997) (quoting NEV. REV. STAT. § 533.025, with the court adding emphasis).

539. *Mineral County*, 20 P.3d at 807–08 (Rose, J., concurring).

natural and necessary where, as here, the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated."[540]

NEW MEXICO

Date of Statehood: 1912

Water Law System: Prior appropriation

New Mexico Constitution: The New Mexico Constitution includes several provisions related to water, and the New Mexico courts have determined that the constitutional declaration of public ownership of the waters is relevant to public use rights. Relevant provisions of the Constitution include:

- Art. XVI, § 1: "All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed."
- Art. XVI, § 2: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of this state. Priority of appropriation shall give the better right."
- Art. XVI, § 3: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."
- Art. XVI, § 6(A): "The 'water trust fund' is created in the state treasury to conserve and protect the water resources of New Mexico and to ensure that New Mexico has the water it needs for a strong and vibrant future. The purpose of the fund shall be to secure a supply of clean and safe water for New Mexico's residents."
- Art. XX, § 21: "The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The Legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people."

New Mexico Statutes:

- N.M. STAT. ANN. § 3-17-7: "A municipality shall consider ordinances and codes to encourage water conservation and drought management planning . . . ."

540. *Id.* at 808 (connecting the public trust doctrine to NEV. REV. STAT. § 533.025, which declares public ownership of Nevada's water).

- N.M. STAT. ANN. §§ 3-27-1 to 3-27-9: Municipal Water Facilities.
- N.M. STAT. ANN. §§ 3-53-1 to 3-53-5: Municipal Regulation of Waters.
- N.M. STAT. ANN. § 17-4-14: This provision prohibits diversions or reductions of flows that are detrimental to game fish.
- N.M. STAT. ANN. § 19-13-2(C): This provision defines "state lands" to include "all land owned by the state, all land owned by school districts, beds of navigable rivers and lakes, submerged lands and lands in which mineral rights have been reserved to the state."
- N.M. STAT. ANN., Chapter 72, Article 1: Water Rights in General. "All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw, or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water."[541] This article also contains provisions related to the Pecos River water shortage crisis and New Mexico's obligations to deliver water to Texas, §§ 72-1-2.1 *et seq.*, and settlements of water rights claims and disputes by tribes.[542]
- N.M. STAT. ANN., Chapter 72, Article 2: State Engineer.
- N.M. STAT. ANN., Chapter 72, Article 3: Water Districts and Water Masters.
- N.M. STAT. ANN., Chapter 72, Article 4: Surveys, Investigations and Adjudications of Water Rights.
- N.M. STAT. ANN., Chapter 72, Article 4A: Water Project Finance.
- N.M. STAT. ANN., Chapter 72, Article 5: Appropriation and Use of Surface Waters.
- N.M. STAT. ANN., Chapter 72, Article 5A: Ground Water Storage and Recovery.
- N.M. STAT. ANN., Chapter 72, Article 6: Water-Use Leasing.
- N.M. STAT. ANN., Chapter 72, Article 7: Appeals from State Engineer.
- N.M. STAT. ANN., Chapter 72, Article 8: Offenses and Penalties under the Water Act of 1907.
- N.M. STAT. ANN., Chapter 72, Article 9: Application of the Water Act of 1907.
- N.M. STAT. ANN., Chapter 72, Article 10: Community Uses.

541. N.M. STAT. § 72-1-1 (2009).
542. *Id.* §§ 72-1-11, 72-1-12.

- N.M. STAT. ANN., Chapter 72, Article 11: Salt Lakes. "All the salt lakes within this state, and the salt which has, or may accumulate on the shores thereof, is, and shall be free to the citizens, and each one shall have power to collect salt on any occasion free from molestation or disturbance."[543]
- N.M. STAT. ANN., Chapter 72, Article 12: Underground Waters. "The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, is declared to belong to the public and is subject to appropriation for beneficial use."[544]
- N.M. STA. ANN., Chapter 72, Article 12A: Mine Dewatering.
- N.M. STAT. ANN., Chapter 72, Article 13: Artesian Wells.
- N.M. STAT. ANN., Chapter 72, Article 14: Interstate Stream Commission; Protection of Interstate Streams.
- N.M. STAT. ANN., Chapter 72, Article 15: Interstate Compacts. The Colorado River Compact is codified within this chapter.[545]

Definition of "Navigable Waters":

New Mexico cases regarding title navigability are limited, and the most important resulted in the U.S. Supreme Court declaring the Rio Grande non-navigable. Specifically, the Court reversed the New Mexico Territorial Court to find that "the Rio Grande is not navigable within the limits of the territory of New Mexico. The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."[546] The Court went on to note:

> Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow is not sufficient.[547]

More recently, the New Mexico Court of Appeals relied on the federal test of navigability from *The Daniel Ball* to declare Navajo Lake to be navigable.[548] However, this question arose in the context of the applicability of maritime law, not state title.

543. *Id.* § 72-11-1.
544. *Id.* § 72-12-1.
545. *Id.* § 72-15-5.
546. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899) (citing The Montello, 87 U.S. (20 Wall.) 430, 439 (1874)).
547. *Id.* at 699.
548. Wreyford v. Arnold, 477 P.2d 332, 336 (N.M. Ct. App. 1970) (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).

State title to the beds and banks of navigable waters is less critical to New Mexico's public trust doctrine than in other states, because the New Mexico Supreme Court held early on that the New Mexico Constitution's declaration of public ownership of waters—Article XVI, § 2—is relevant to the definition of "public waters" for public use purposes. Regarding this provision as a declaration of existing law, not a change, the court concluded that beneficial uses include recreation and fishing, unhampered by a doctrine of riparian rights.[549] Moreover, navigability under federal law is not the only test for determining whether waters are public; recreational use is enough.[550]

Rights in "Navigable Waters":

"So far as non-navigable streams are concerned, the common law rule, seemingly without exception, is that the one owning both banks of a stream likewise owns the entire bed thereof, the waters are private waters, and the owner has the exclusive right to fish therein."[551] Although "[t]he same rule is sometimes applied to navigable streams . . . it is conceded that the weight of authority is, rather, that the bed and waters of a navigable stream are the property of the public with adjoining land owners having no exclusive right to fish therein."[552] Indeed:

> Where there is no separation in ownership of soil and water, "the right to hunt and trap from boats on rivers, lakes, streams, etc., is analogous to the right to take fish from the water. As a general rule, the test as to the public right of fowling, hunting, and trapping is the public or private ownership of the soil beneath the waters."[553]

As in many western states, the fact that the New Mexico Constitution declares waters to be publicly owned is relevant not just to state water law but also to the public's rights to use those waters. In 1947, the New Mexico Supreme Court declared that all waters are public waters until beneficially appropriated, and hence the public can use all waters for outside recreation, sports, and fishing.[554]

In 1899, the U.S. Supreme Court suggested with regard to the Rio Grande River that the federal government's interest in downstream navigability may limit application of the prior appropriation doctrine. Thus, even though the Rio Grande is non-navigable in New Mexico, the Rio Grande Dam & Irrigation Company could *not* divert the entire flow of the river and so destroy

549. State *ex rel.* State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 427–28 (N.M. 1947).
550. *Id.* at 430.
551. *Id.* at 426.
552. *Id.*
553. *Id.* (quoting 24 AM. JUR. 378).
554. *Id.* at 429–32.

downstream navigability.[555] While the Court recognized that the western states were moving toward prior appropriation, it still held that appropriative rights under state law could not destroy the United States' rights to downstream flow.[556] As a result, it remanded the case for a determination of the effects of the irrigation company's proposed dam and diversion on downstream navigability.[557] After the case made another trip to the Supreme Court,[558] the New Mexico Territorial Court eventually concluded that the irrigation company had forfeited its right to build the dam.[559]

NORTH DAKOTA

Date of Statehood: 1889

Water Law System: Prior appropriation

North Dakota Constitution: The North Dakota Constitution has two provisions potentially relevant to public trust principles:

- Art. XI, § 3: "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes."
- Art. XI, § 27: "Hunting, trapping, fishing and the taking of game area valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good."

North Dakota Statutes:

- N.D. CENT. CODE § 47-01-15: "Except when the grant under which the land is held involves a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low watermark. All navigable rivers shall remain and be deemed public highways. In all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both."
- N.D. CENT. CODE § 47-06-08: "Islands and accumulations of land formed in the beds of streams which are navigable belong to the state, if there is no title or prescription to the contrary. The control and management, including the power to execute surface and

555. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 701–02 (1899).
556. *Id.* at 703.
557. *Id.* at 710.
558. United States v. Rio Grande Dam & Irrigation Co., 65 P. 276 (N.M. Terr. 1900), *rev'd and remanded*, 184 U.S. 416, 424–25 (1902).
559. United States v. Rio Grande Dam & Irrigation Co., 85 P. 393, 399 (N.M. Terr. 1906).

mineral leases, of islands, relictions, and accumulations of land owned by the state of North Dakota in navigable streams and waters and the beds thereof, must be governed by chapter 61-33."

- N.D. CENT. CODE § 61-01-01: "All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to uses these waters must be acquired pursuant to chapter 61-04": surface waters, "excluding diffuse surface waters," and all waters underground.
- N.D. CENT. CODE § 61-01-08: "Every person who in any manner obstructs the free navigation of any navigable watercourse within this state is guilty of a misdemeanor."
- N.D. CENT. CODE § 61-01-17: This provision allows the booming of logs on shores of navigable streams, but the owner must leave a channel for free passage.
- N.D. CENT. CODE § 61-01-26: State Water Resources Policy.
- N.D. CENT. CODE, Chapter 61-04: Appropriation of Water. Among other things, the proposed appropriation must be in the public interest, which includes consideration of "the effect on fish and game resources and public recreation opportunities."[560] North Dakota prioritizes uses of water; fish, wildlife, and recreational uses are all included in the sixth priority, after domestic, municipal, livestock, irrigation, and industrial uses.[561]
- N.D. CENT. CODE § 61-04.1-01: "[T]he state of North Dakota claims its sovereign right to use the moisture contained in the clouds and atmosphere within the state boundaries. All water derived as a result of weather modification operations shall be considered a part of North Dakota's basic water supply and all statutes, rules, and regulations applying to natural precipitation shall also apply to precipitation resulting from cloud seeding."
- N.D. CENT. CODE, Chapter 61-15: Water Conservation. A "navigable lake" is "any lake which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands."[562] This section also defines "high water mark." Under its police power, the state has control of navigable lakes "within the ordinary high water mark for the purpose of constructing, maintaining, and operating dams, dikes, ditches, fills, spillways, or other structures to promote the conservation, development, storage, distribution, and utilization of

560. N.D. CENT. CODE § 61-04-06(4) (2009).
561. *Id.* § 61-04-06.1.
562. *Id.* § 61-15-01.

such water and the propagation and preservation of wildlife."[563] These provisions also allow for water and wildlife conservation projects.[564] Finally, "[a]ny person who, without written consent of the state engineer, shall drain or cause to be drained, or who shall attempt to drain any lake or pond, which has been meandered by the government of the United States in the survey of public lands, shall be guilty of a class B misdemeanor."[565]

- N.D. CENT. CODE § 61-33-01: "Sovereign lands" are "those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams."

Definition of "Navigable Waters":

Navigability for title purposes is a question of federal law, and a water is navigable if it is navigable-in-fact.[566] North Dakota does not employ the tidal navigability test.[567] Instead:

> When a stream is not tidewater . . . , it must be navigable in fact in its natural state, without the aid of or reference to artificial means, and be of sufficient capacity to render it capable of being used as a highway for commerce, either in the transportation of the products of the mines, forests, or of the soil of the country through which it runs, or of passengers . . . .
>
> It must be capable of being used for such a purpose, that is, for a public highway, a considerable part of the year, and it is not sufficient that it have an adequate volume of water therefor only occasionally, as the result of freshets, for brief periods of uncertain recurrence and duration.[568]

The North Dakota Supreme Court has noted, however, that "the test as to navigability applied in North Dakota is not as narrow as that in federal courts . . . ."[569] A water will be deemed navigable-in-fact for state title purposes if it supports rowing for pleasure and hunting, the cutting and selling of ice, or hunting from flat-bottomed boats.[570] Similarly, public uses supporting navigability do not have to be commercial or pecuniary:

> A use public in its character may exist when the waters may be used for the convenience and enjoyment of the public, whether traveling upon trade purposes or pleasure purposes. . . . Purposes of pleasure, public

563. *Id.* § 61-15-02.
564. *Id.* § 61-15-03.
565. *Id.* § 61-15-08.
566. Ozark-Mahoning Co. v. North Dakota, 37 N.W.2d 488, 490 (N.D. 1949).
567. Roberts v. Taylor. 181 N.W. 622, 625 (N.D. 1921).
568. Bissel v. Olson, 143 N.W. 340, 341 (N.D. 1913) (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563; The Montello, 87 U.S. (20 Wall.) 430 (1874)).
569. *Ozark-Mahoning Co.*, 37 N.W.2d at 491.
570. North Dakota v. Brace, 36 N.W.2d 330, 333 (N.D. 1949).

> convenience, and enjoyment may be public as well as purposes of trade. Navigation may as surely exist in the former as in the latter.[571]

In addition, it is the capacity for public use, not current use, that counts.[572]

Even so, under this test Fuller Lake is non-navigable, because it is small and marshy and its only public use is hunting.[573] Similarly, Grenora Lake is also not navigable:

> There is no evidence that any use has ever been or could be made of the waters of the lake either for pleasure or for profit, for travel, or for trade. No boats were used thereon. The water at all times has been of such a character that it was not habitable for fish. Neither the lake not its surroundings are suitable for any purposes of pleasure. It is true that aquatic birds sometimes rested on its surface and there is evidence that hunters occasionally shot waterfowl that flew to or from the lake, but this was an infrequent occurrence.[574]

The provision of the North Dakota Constitution declaring waters to be publicly owned does not give the state *title* to the beds and banks.[575] The Legislature can declare waters navigable, but "[t]he Legislature may not adopt a retroactive definition of navigability which would destroy a title already vested under a federal grant, or transfer to the state a property right in a body of water or the bed thereof that had previously been acquired by a private owner."[576]

Unless a waterway is meandered or declared navigable by the state legislature, it is presumed to be non-navigable, and the burden of proof is on the party claiming navigability.[577] Thus, the Mouse River was presumed non-navigable, because the parties assumed that it was.[578] In contrast, Devil's Lake was stipulated to be navigable-in-fact based on boats using the lake for commercial purposes.[579] Similarly, "it is clear from the undisputed testimony . . . and from prior holdings of this court that the Missouri River is a navigable stream in this state."[580]

North Dakota engaged in a long battle with the United States to quiet title to the Little Missouri River. Despite original findings that the river was navigable, the U.S. Supreme Court dismissed North Dakota's quiet title claim on the grounds that North Dakota had failed to comply with the Quiet Title

571. *Roberts*, 181 N.W. at 626.
572. *Id.*
573. *Brace*, 36 N.W.2d at 334.
574. *Ozark-Mahoning Co.*, 37 N.W.2d at 491.
575. *Id.* at 335; *see also Roberts*, 181 N.W. at 625 (noting that this constitutional provision "is a declaration concerning public waters").
576. *Brace*, 36 N.W.2d at 332.
577. Amoco Oil Co. v. N.D. Highway Dep't, 262 N.W.2d 726, 728 (N.D. 1978).
578. *Id.*
579. Rutten v. North Dakota, 93 N.W.2d 796, 797 (N.D. 1958).
580. Hogue v. Bougois, 71 N.W.2d 47, 52 (N.D. 1955) (citing Gardner v. Green, 271 N.W. 775; North Dakota v. Loy, 720 N.W.2d 668).

Act's twelve-year statute of limitations[581] for claims against the federal government.[582] In 1986, Congress amended the Act to exempt state claims to navigable rivers from the statute of limitations, and North Dakota re-filed its action. Nevertheless, despite evidence of use by Indians, ferries, and explorers, and modern use by recreational canoeists, the U.S. Court of Appeals for the Eighth Circuit concluded that the Little Missouri River is not navigable and that title to its beds and banks remains in the United States.[583] The court applied *The Daniel Ball* test of navigability.[584]

Rights in "Navigable Waters":

Riparian landowners own to the thread of non-navigable streams.[585] The federal equal footing doctrine gives states title to the beds underlying navigable waterways to the high water mark, but states can then pick a different title line. Despite a statutory provision establishing that riparian landowners generally take title to the low water mark,[586] "[w]hether North Dakota has limited its title to the area below the low watermark has not been decided."[587]

Regardless of title, however, the public trust doctrine extends to the high water mark, because under the equal footing doctrine and the public trust doctrine, the state could not totally abdicate its interest in that land.[588] Thus, the state and private landowners have co-existent, overlapping interests in the shore zone between the high and low water marks.[589] The ordinary high water mark is determined by the existing state of the river, even if Army Corps dams—as on the Missouri River—have raised the water level.[590] "[T]he state has rights in the property up to the ordinary high watermark. The ordinary high watermark is ambulatory, and is not determined as of a fixed date."[591] The public trust doctrine and its protection of the public's right of navigation support this view.[592]

581. 28 U.S.C. § 2409a (1972).
582. Block v. North Dakota *ex rel.* Bd. of University & School Lands, 461 U.S. 273, 284–93 (1983).
583. North Dakota *ex rel.* Bd. of University & School Lands v. United States, 972 F.2d 235, 240 (8th Cir. 1992).
584. *Id.* at 237–38.
585. Amoco Oil Co. v. North Dakota Highway Dep't, 262 N.W.2d 726, 728 (N.D. 1978) (citing St. Paul & P.R.R. Co. v. Schurmeier, 72 U.S. 272, 287–89 (1868)).
586. N.D. CENT. CODE § 47-01-15 (2009).
587. J.P. Furlong Enterprises, Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130, 132 n.1 (N.D. 1988). *But see* State *ex rel.* Sprynczynatyk v. Mills (*Mills I*), 523 N.W.2d 537, 540–42 (N.D. 1994).
588. *Mills I*, 523 N.W.2d at 542–44.
589. State *ex rel.* Sprynczynatyk v. Mills (*Mills II*), 592 N.W.2d 591, 592 (N.D. 1999).
590. *Id.*
591. *Id.* (citing *In re* Ownership of the Bed of Devil's Lake, 423 N.W.2d 141, 143–44 (N.D. 1988)).
592. *Id.* at 593.

"The purpose of state title was to protect the public right of navigation."[593] Indeed, by statute, "[a]ll navigable rivers shall remain and be deemed public highways."[594] Thus, the policy of protecting the public right of navigation is embodied in both the public trust doctrine and North Dakota statutes.[595] State title and public rights shift to the new beds when navigable rivers change course:

> The Territorial Legislative Assembly recognized that our state would receive title to the beds of navigable waters at statehood. Accordingly, by 1877, it had enacted a code that would secure title of the state to such lands and modify common law so that the state's title would follow the movement of the bed of the river. This accords with the underlying public policy, since the purpose of a state holding title to a navigable riverbed is to foster the public's right of navigation, traditionally the most important feature of the public trust doctrine. Moreover, it seems to us that other important aspects of the state's public interest, such as bathing, swimming, recreation, and fishing, as well as irrigation, industrial and other water supplies, are most closely associated with where the water is in the new riverbed, not the old.[596]

The public trust doctrine does not prohibit all development, and hence the granting of a permit to drain wetlands did not violate the public trust doctrine—assuming that the doctrine even applied—when the State Engineer studied the consequences, imposed conditions, and was subject to a public interest requirement.[597] However, the public trust doctrine *does* limit the state's discretionary authority "to allocate vital state resources," as enunciated in *Illinois Central Railroad*.[598]

Moreover, the doctrine is not restricted to conveyances of real property; instead, "[t]he State holds the navigable waters, as well as the lands beneath them, in trust for the public," as provided in the North Dakota Constitution and refined in statutes.[599] Thus, North Dakota's public trust doctrine applies to appropriations of water. When the State Engineer issues water permits, "the Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future needs of this State. This necessarily involves planning responsibility."[600] While the

593. J.P. Furlong Enters., Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130, 132 (N.D. 1988).

594. N.D. CENT. CODE § 47-01-15 (2009).

595. *J.P. Furlong Enters.*, 423 N.W.2d at 136–37.

596. *Id.* at 140.

597. In the Matter of the Application for Permits to Drain Related to Stone Creek Channel Improvements & White Spur Drain, 424 N.W.2s 894, 901 (N.D. 1988) (citing United Plainsmen v. N.D. Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976)).

598. *United Plainsmen Ass'n*, 247 N.W.2d at 460.

599. *Id.* at 461 (noting that "[w]e believe that § 61-01-01, NDCC, expresses the Public Trust Doctrine").

600. *Id.*

North Dakota Supreme Court also acknowledged that "[i]t is evident that the Public Trust Doctrine is assuming an expanding role in environmental law," it saw no need for such expansive declarations in the context of water rights permitting.[601] Instead, even as "[c]onfined to traditional concepts, the Doctrine confirms the State's role as trustee of the public waters. It permits alienation and allocation of such precious state resources only after an analysis of present supply and future need."[602]

OKLAHOMA

Date of Statehood: 1907

Water Law System: Prior appropriation and riparian rights[603]

Oklahoma Constitution: Only one provision of the Oklahoma Constitution is relevant to water. It declares that "[t]he Legislature shall have power and shall provide for a system of levees, drains, and ditches and of irrigation in this State when deemed expedient . . . ."[604]

Oklahoma Statutes:

- OKLA. STAT. ANN. tit. 60, § 60: This section preserves riparian rights to use water for domestic use.
- OKLA. STAT. ANN. tit. 60, § 337: "Islands and accumulations of land formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary."
- 80 OKLA. STAT. ANN. tit., Chapter 1: Irrigation and Water Rights.
- 80 OKLA. STAT. ANN. tit., Chapter 1A: Oklahoma Dam Safety Act.
- 80 OKLA. STAT. ANN. tit., Chapter 2: Irrigation Districts.
- 80 OKLA. STAT. ANN. tit., Chapter 4: Conservation in General.

601. *Id.* at 463.

602. *Id.*; *see also* N.D. State Water Comm'n v. Bd. of Managers, 332 N.W.2d 254, 258 (N.D. 1983) (holding that the State does not lose its authority over the waters of a lake merely because the bed is privately owned and determining that "[p]rotecting the integrity of the waters of the state is a valid exercise of the Commission's duties pursuant to § 61-02-12, NDCC, as well as being part of the state's affirmative duty under the 'public trust' doctrine"; as a result the Commission had authority to control the drainage of a non-navigable lake).

603. Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 571–72 (Okla. 1990) (noting that while the 1963 amendments to Oklahoma's water law modified riparian rights, Oklahoma riparian owners retain "a vested common-law right to the reasonable use of the stream," and the legislature's attempt to extinguish those riparian rights by giving ownership of all water to the state was unconstitutional; however, appropriative rights for irrigation have existed since 1897, and riparian and appropriative rights are co-existent).

604. OKLA. CONST., art. XVI, § 3.

- 80 OKLA. STAT. ANN. tit., Chapter 5: Conservancy Act of Oklahoma.
- 80 OKLA. STAT. ANN. tit., Chapter 8: Grand River Dam Authority.
- 80 OKLA. STAT. ANN. tit., Chapter 11: Oklahoma Groundwater Law.
- 80 OKLA. STAT. ANN. tit., Chapter 14: Oklahoma Water Resources Board.
- 80 OKLA. STAT. ANN. tit., Chapter 14A: Oklahoma Weather Modification Act.
- 80 OKLA. STAT. ANN. tit., Chapter 15: Port Authorities.
- 80 OKLA. STAT. ANN. tit., Chapter 17: Regional Water Distribution Act.
- 80 OKLA. STAT. ANN. tit., Chapter 18: Rural Water, Sewer, Gas and Solid Waste Management Districts Act.
- 80 OKLA. STAT. ANN. tit., Chapter 20: Kansas-Oklahoma Arkansas River Basin Compact.
- 80 OKLA. STAT. ANN. tit., Chapter 20A: Arkansas River Basin Compact Arkansas-Oklahoma.
- 80 OKLA. STAT. ANN. tit., Chapter 20B: Red River Compact.
- 80 OKLA. STAT. ANN. tit., Chapter 21: Scenic Rivers Act.
- 80 OKLA. STAT. ANN. tit., Chapter 22: Conservation District Act.
- 80 OKLA. STAT. ANN. tit., Chapter 23: Oklahoma Floodplain Management Act.
- 80 OKLA. STAT. ANN. tit., Chapter 25: Oklahoma Weather Modification Act.

Definition of "Navigable Waters":

Navigability is a question of fact, and the Oklahoma Supreme Court has adopted and applied the federal test of navigability from *The Montello*.[605] Under this test, the South Canadian River is non-navigable, and avulsive (sudden) changes to the river did not change title.[606] Similarly, no stipulation was allowed as to the navigability of the Grand River or the Neosho River, and both were found non-navigable under the federal test of navigability.[607]

605. The Montello, 87 U.S. (20 Wall.) 430, 439 (1874); *see* Hale v. Record, 146 P. 587, 587 (Okla. 1915).

606. State *ex rel.* Comm'rs of Land Office v. Warder, 198 P.2d 402, 406–07 (Okla. 1948).

607. Hanes v. Oklahoma, 973 P.2d 330, 333–34 (Okla. Crim. App. 1998).

The Oklahoma Supreme Court has distinguished navigability for title purposes from navigability for public use purposes. Thus, it found that the Kiamichi River was navigable for fishing and pleasure but not for commerce:

> [W]e find that the Kiamichi River is one of the beautiful streams of southeastern Oklahoma that it has for many years been known as one of the best fishing streams in the State and used by the public for fishing, recreation and pleasure; that at one time the stream was used for commercial purposes in that logs were floated down its channel to be used for mill purposes; that at the site of the controversy herein the river was between 150 and 200 feet in width; that many small boats used the river.[608]

Thus, the river was not navigable for title purposes and private landowners owned the bed of the river. However, that ownership is "subject to the rights of the public to use the river as a public highway," and the landowner "does not . . . have exclusive fishing rights therein."[609] Thus, the Kiamichi River was "navigable" in the sense that the public could use the river, but not in the sense that the state owned the bed.[610]

The Oklahoma Supreme Court has held that the Arkansas River is navigable; as a result, title to the bed vested in the state.[611] However, eight years later, the U.S. Supreme Court declared that under the federal test of navigability, the Arkansas River along the Osage Indian Reservation in Oklahoma is non-navigable and belongs to the United States in trust for the Tribe.[612] The Oklahoma Supreme Court responded by declaring that the Osage Tribe had title only to the bed of the non-navigable portions.[613]

In 1953, the Oklahoma Supreme Court declared that the Arkansas River was navigable from its confluence with the Grand River, vesting title to the bed in the state.[614] However, the U.S. Supreme Court determined that the entire river below its confluence with the Grand River, while navigable, was reserved to the Cherokee, Chickasaw, and Choctaw tribes by treaty.[615]

In addition, the U.S. Supreme Court has declared that the Red River is not navigable anywhere in Oklahoma, so the state does not own its beds.[616]

608. Curry v. Hill, 460 P.2d 933, 935 (Okla. 1969).

609. *Id.*

610. *Id.* at 936.

611. Oklahoma v. Nolegs, 139 P. 943, 945 (Okla. 1914).

612. Brewer Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86–87 (1922).

613. Vickey v. Yahola Sand & Gravel Co., 12 P.2d 881, 885 (Okla. 1932). *But see* Aladdin Petroleum Corp. v. State *ex rel.* Comm'rs of Land Office, 191 P.2d 224, 229–30 (Okla. 1948) (applying the U.S. Supreme Court's non-navigability analysis to the Arkansas River).

614. Lynch v. Clements, 263 P.2d 153, 156 (Okla. 1953).

615. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630–32 (1970); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 701 (1987).

616. Oklahoma v. Texas, 259 U.S. 565, 566–67 (1922); *accord Aladdin Petroleum Corp.*, 191 P.2d at 228–29. *Contra* Hale v. Record, 146 P. 587, 588 (Okla. 1915) (finding the Red River to be navigable).

Rights in "Navigable Waters":

The state takes title to the beds of navigable rivers to the high water mark.[617] Moreover, pursuant to *Illinois Central Railroad*, the government has a right to regulate public wharves and piers in navigable waters, loading places along navigable waters, and rights in navigable waters.[618] The Oklahoma courts have not otherwise extensively addressed the state public trust doctrine, except to hold that the public has rights of boating, recreation, and fishing in waters that are not navigable under the federal title test.[619]

When the Oklahoma Supreme Court acknowledged the co-existence of riparian and appropriative water rights in 1990, the dissent was "of the . . . opinion that the majority confuses certain public rights in our streams as being exclusive private property rights of riparians."[620] In contrast, the dissent was willing to establish an expansive public trust doctrine that would require minimum flows in Oklahoma's rivers and supersede private rights.[621]

OREGON

Date of Statehood: 1859

Water Law System: Prior appropriation[622]

Oregon Constitution: Oregon has not constitutionalized its public trust doctrine. However, the Oregon Constitution contains several relevant provisions, including:

- Art. I, § 1: As part of its private property takings protections, the Oregon Constitution states that "the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."
- Art XI-D, § 1: "The rights, title and interest in and to all water for the development of water power and to water power sites, which the

617. Oklahoma v. Nolegs,139 P. 943, 945–46 (Okla. 1914); City of Tulsa v. Comm'rs of Land Office, 101 P.2d 246, 248 (Okla. 1940).

618. Sublett v. City of Tulsa, 405 P.2d 185, 196 (Okla. 1965).

619. Curry v. Hill, 460 P.2d 933, 935–36 (Okla. 1969).

620. Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 595 (Okla. 1990) (Hargrave, J., dissenting).

621. *Id.* at 595–96.

622. *See In re* Hood River, 227 P. 1065, 1089–90 (Or. 1924) (upholding the state's prior appropriation system).

state of Oregon now owns or may hereafter acquire, shall be held by it in perpetuity."

- Art. XI-D, § 2: As part of its constitutional authority over water power, "[t]he state of Oregon is authorized and empowered," *inter alia*: (1) "[t]o control and/or develop the water power within the state"; (2) "[t]o lease water and water power sites for the development of water power"; (3) "[t]o develop, separately or in conjunction with the United States, or in conjunction with the political subdivisions of this state, any water power within the state, and to acquire, construct, maintain and/or operate hydroelectric power plants, transmission and distribution lines"; (4) "[t]o develop, separately or in conjunction with the United States, with any state or states, or political subdivisions thereof, or with any political subdivision of this state, any water power in any interstate stream and to acquire, construct, maintain and/or operate hydroelectric power plants, transmission and distribution lines"; (5) "[t]o contract with the United States, with any state or states, or political subdivisions thereof, or with any political subdivision of this state, for the purchase or acquisition of water, water power and/or electric energy for use, transmission, distribution, sale and/or disposal thereof"; and (6) "[t]o do any and all things necessary or convenient to carry out the provisions of this article."
- Art XI-D, § 4: Nothing in the constitutional authority over water power "shall be construed to affect in any way the laws, and the administration thereof, now existing or hereafter enacted, relating to the appropriation and use of water for beneficial purposes, other than for the development of water power."
- Art. XI-H, § 1: This article provides for "loans and grants for the purpose of planning, acquisition, construction, alteration or improvement of facilities for or activities related to, the collection, treatment, dilution and disposal of all forms of waste in or upon the air, water and lands of this state."
- Article XI-I(1): This article covers water development projects and creates a Water Development Fund. "The fund shall be used to provide financing for loans for residents of this state for construction of water development projects for irrigation, drainage, fish protection, watershed restoration and municipal uses and for the acquisition of easements and rights of way for water development projects authorized by law."
- Art. XV, §§ 4, 4a: These two provisions allow state lottery funds to be used for "the public purpose of financing the protection, repair, operation, creation and development of state parks, ocean shores and public beach access areas, historic sites and recreation areas . . . ."

- Art. XV, §§ 4, 4b: These two provisions allow state lottery funds to be used for salmonid and wildlife protection, including protection and restoration of watersheds, aquatic habitats, and water quality.

Oregon Statutes:

- OR. REV. STAT., Chapter 196: Columbia River Gorge; Ocean Resource Planning; Wetlands; Removal and Fill. "The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Department of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state."[623] The Director of the Department of State Lands may issue permits for the fill or dredging of water resources only if the activity: "(a) [i]s consistent with the protection, conservation and best use of the water resources of this state . . . ; and (b) [w]ould not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation."[624] The Oregon courts have concluded that these two provisions (as formerly numbered) "are a codification of the public trust doctrine."[625]
- OR. REV. STAT., Chapter 274: Submersible and Submerged Lands. In general, "submerged lands" in Oregon are "lands lying below the line of ordinary low water of all navigable waters within the boundaries of this state as heretofore or hereafter established, whether such waters are tidal or nontidal."[626] "Submersible lands," in contrast, are the "lands lying between the line of ordinary high water and the line of ordinary low water of all navigable waters and all islands, shore lands, or other such lands held by or granted to this

623. OR. REV. STAT. § 196.805 (2009).
624. *Id.* § 196.825(1).
625. Morse v. Or. Div. of State Lands, 581 P.2d 520, 527 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 709 (Or. 1979).
626. OR. REV. STAT § 274.005(7).

state by virtue of her sovereignty, wherever applicable, within the boundaries of this state as heretofore or hereafter established, whether such waters or lands are tidal or nontidal."[627] The "line of ordinary high water" is "the line on the bank or shore to which the high water ordinarily rises annually in season," while the "line of ordinary low water" is "the line on the bank or shore to which the low water ordinarily recedes annually in season."[628] "Tidal submerged lands" are "lands lying below the line of mean low tide in the beds of all tidal waters within the boundaries of this state as heretofore or hereafter established."[629] "The title to the submersible and submerged lands of all navigable streams and lakes in this state now existing or which may have been in existence in 1859 when the state was admitted to the Union, or at any time since admission, and which has not become vested in any person, is vested in the State of Oregon. The State of Oregon is the owner of the submersible and submerged lands of such streams and lakes, and may use and dispose of the same as provided by law."[630] "The State Land Board has exclusive jurisdiction to assert title to submerged or submersible lands in navigable waterways on behalf of the State of Oregon,"[631] and this chapter provides procedures for the administrative determination of navigability.[632] Moreover, "all meandered lakes are declared to be navigable and public waters," with title to their submerged and submersible lands vested in the State of Oregon unless otherwise validly conveyed.[633] "The Department of State Lands [had] exclusive jurisdiction over all ungranted tidal submerged lands owned by this state . . . ."[634]

- OR. REV. STAT., Chapter 537: Water Rights Act. "All water within the state from all sources of water supply belongs to the public," including ground water.[635] The Act allows for instream water rights for public uses,[636] and public uses include but are not limited to recreation, "conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values," pollution abatement, and navigation.[637] In addition, "[p]ublic uses are beneficial uses," but "[t]he recognition of an in-stream water right . . . shall not diminish the public's rights

627. *Id.* § 274.005(8).
628. *Id.* § 274.005(3), (4).
629. *Id.* § 274.705(7).
630. *Id.* § 274.025(1).
631. *Id.* § 274.402(1).
632. *Id.* §§ 274.404 to 274.412.
633. *Id.* § 274.430(1).
634. *Id.* § 274.710.
635. *Id.* §§ 537.010, 537.525.
636. *Id.* §§ 537.332– 537.360.
637. *Id.* § 537.332(5)(b).

in the ownership and control of the waters of this state or the public trust therein."[638] The Water Rights Act also allows for extensions of the irrigation season[639] and encourages conservation of water.[640]

- OR. REV. STAT., Chapter 780: Improvement and Use of Navigable Streams: "All channels of rivers and watercourses made navigable or the navigation of which is improved . . . shall be public highways, and shall be free to all crafts navigating them."[641]

Definition of "Navigable Waters":

For title purposes, Oregon originally adhered to the ebb-and-flow tidal test of navigability.[642] Thus, because the Tualatin River was not subject to the ebb and flow of the tide, its bed and banks were privately owned.[643] In contrast, the bed and banks of the Columbia River, which *is* subject to the ebb-and-flow of the tide, are owned by the state.[644] Moreover, in tidal waters, state title advances with the rising of the sea.[645]

However, the Oregon Supreme Court soon thereafter adopted a fairly liberal log floatation test of navigability that extended public use navigability to navigable-in-fact waters. It held in 1869 that:

> any stream in this state is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose; and that it is not necessary that they be navigable the whole year for that purpose to constitute them as such. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined as any other question of fact by a jury. Any stream in which logs will go by the force of the water is navigable.[646]

This rule, the court held, best served Oregon public policy:

638. *Id.* § 537.334(1), (2).
639. *Id.* § 537.385.
640. *Id.* § 537.460.
641. *Id.* § 780.030.
642. *See* Weise v. Smith, 3 Or. 445, 448–49 (1869) (recognizing that the navigable-in-fact test has largely replaced the ebb-and-flow tidal test in the United States); Hinman v. Warren, 6 Or. 408, 411 (1877) (holding that "the tide lands—those uncovered by the ebb and flow of the sea—belong to the state of Oregon by virtue of its sovereignty"); Hogg v. Davis, 30 P. 160, 160 (Or. 1892) (same); Bowlby v. Shively, 30 P. 154, 156 (Or. 1892), *aff'd*, 152 U.S. 1 (1894) ("Upon the admission of the state into the Union, the tide lands became the property of the state, and subject to its jurisdiction and disposal.").
643. Shaw v. Oswego Iron Co., 10 Or. 371, 376, 380–82 (1882).
644. *Hinman*, 6 Or. at 411–12; *see also* Atkinson v. Tax Comm'n of Or., 303 U.S. 20, 22 (1938) (determining that Oregon, not the United States, owns the bed of the Columbia River on Oregon's side of the border with Washington); Hume v. Rogue River Packing Co., 92 P. 1065, 1067 (Or. 1907) (determining that the Rogue River is navigable, and its bed is owned by the State, because it is influenced by the tide for at least four miles).
645. Wilson v. Shively, 4 P. 324, 325–26 (Or. 1884).
646. Felger v. Robinson, 3 Or. 455, 457–58 (1869).

> And we think it the rule that best accords with common sense and public convenience, for these rapid streams, penetrating deep into the mountains, are the only means by which timber can be brought from these rugged sections, without great labor and expense; and by their use large tracts of timber, otherwise too remote or difficult of access, can be rendered of great value, as the country shall grow and timber become scarce.[647]

Thus, "[a] stream, which, in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passageway."[648]

As such, the Oregon courts early on distinguished three categories of waters:

> First, Such rivers, or arms of the sea, in which the tide ebbs and flows; and in these, which are technically called navigable, the sovereign is the owner of the subjacent soil, and all right in it belongs exclusively to the public. Second, Such streams as are navigable in fact for boats, vessels, or lighters; and in these, which are termed public highways, the public have an easement for the purposes of navigation and commerce, but the title of the subjacent soil to the middle of the stream, and the right to the use of the water flowing over it is in the riparian owner, subject to the superior rights of the public to use it for the purposes of transportation and trade. Third, Such streams as are so small or shallow as not to be navigable for any purpose; and in these the public have no rights of a highway or otherwise, and they are altogether private property.[649]

In 1935, however, the State of Oregon was involved in litigation in the U.S. Supreme Court that applied the federal navigable-in-fact test to determine whether Oregon had title to the beds of Lake Malheur, Mud Lake, Harney Lake, the Narrows, and Sand Reef.[650] The U.S. Supreme Court emphasized that navigability for purposes of title is a federal question[651] and applied the

647. *Id.* at 458.

648. Weise v. Smith, 3 Or. 445, 449 (1869); *see also* Haines v. Hall, 20 P. 831, 835 (Or. 1888) ("Whether the creek in question is navigable or not . . . depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public."); Nutter v. Gallagher, 24 P. 250, 252–53 (Or. 1890); Kamm v. Normand, 91 P. 448, 450–53 (Or. 1907); Lebanon Lumber Co. v. Leonard, 136 P. 891, 892 (Or. 1913); Guilliams v. Beaver Lake Club, 175 P. 437, 440–42 (Or. 1918).

649. Shaw v. Oswego Iron Co., 10 Or. 371, 375–76 (1882); *see also* Haines v. Welch, 12 P. 502, 503 (noting that navigability "depends upon [the water's] capacity, extent and importance. If it is capable of serving an important public use as a channel for commerce, it should be considered public; but if it is only a brook, although it might carry down saw logs for a few days during a freshet, it is not, therefore, a public highway. (citation omitted) And even if it were public, in the sense that it is useful to float products to market, it can only be used with due regard to the rights of the owner of its banks through which it flows.").

650. United States v. Oregon, 295 U.S. 1, 14 (1935).

651. *Id.* at 14.

federal commerce-based test to determine that none of the waters in question was navigable in fact:

> [N]either trade nor travel did then or at any time since has or could or can move over said [waters], or any of them, in their natural or ordinary conditions according to the customary modes of trade or travel over water; . . . nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce.[652]

As a result, the Oregon courts now apply the federal navigable-in-fact test of navigability as well as the tidal test. Moreover, while acknowledging that this test derives from *The Daniel Ball*, *The Montello*, and *United States v. Utah*, they apply this title test broadly, emphasizing that the extent of commerce on a river is *not* the test.[653] Timber use and log floatation are still evidence of navigability,[654] and the Oregon Court of Appeals declared the John Day River navigable on the basis of Native American use and log floatation for timber purposes.[655]

In addition, according to contemporary Oregon statutes, all meandered lakes are considered navigable and public, unless otherwise validly conveyed.[656] Moreover, by statute, Oregon recognizes both the tidal and navigable-in-fact tests for navigability.[657] Thus, Oregon now asserts title by statute to a broader category of waters than the federal title navigability test would allow, because Oregon asserts title to the submerged and submersible lands of waters which became navigable *after* its admission to the United States in 1859, unless those lands have been validly conveyed to private persons.[658]

Rights in "Navigable Waters":

Oregon provided the occasion for the U.S. Supreme Court to determine that, once submerged lands passed from the federal government to the states, issues of title as between the state and private landowners were to be determined by state law.[659] This case involved the Willamette River, and

652. *Id.* at 15 (citing United States v. Holt State Bank, 270 U.S. 49, 56 (1926); United States v. Utah, 283 U.S. 64, 76 (1931); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922); Oklahoma v. Texas, 258 U.S. 574, 586 (1922); Econ. Light & Power Co. v. United States, 256 U.S. 113, 123 (1921); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).

653. Nw. Steelheaders Ass'n. Inc. v. Simantel, 112 P.3d 383, 389–90 (Or. Ct. App. 2005).

654. *Id.* at 390.

655. *Id.* at 391–95.

656. OR. REV. STAT. § 274.430(1) (2009).

657. *Id.* § 274.005(7)–(8).

658. *Id.* § 274.025(1).

659. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370–72 (1977) (overruling Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)).

Oregon eventually decided that, under Oregon law, the state retained ownership of the bed after an avulsive change to the river.[660]

Oregon also provided the occasion for the U.S. Supreme Court to declare that, as a federal matter, states take title to the beds of navigable waters to the high-water mark.[661] Oregon has now codified this rule.[662] Moreover, no adverse possession of lands below the low-water mark of navigable waters is allowed.

In Oregon, riparian owners retain riparian rights to use the water and submerged lands below the high-water mark, including the right to wharf out, the right to moor logs on the water, and a preference in leasing or purchasing tidelands, if the state decides to lease or sell them.[663] However, these rights are subject to the public's rights of use.[664]

The Oregon courts have acknowledged that

> lands underlying navigable waters have been recognized as unique and limited resources and have been accorded special protection to insure their preservation for public water-related uses such as navigation, fishery and recreation. Under the common law public trust doctrine, the public use of such waters could not be substantially modified except for water-related purposes.[665]

"The state, as trustee for the people, bears the responsibility of preserving and protecting the right of public use of the waters for those purposes."[666]

These trustee responsibilities have been applied to fishing regulation. As a result, statutes purporting to convey exclusive rights to fish in navigable waters violated the privileges and immunities clause in the Oregon Constitution.[667] Nevertheless, because the state has jurisdiction over navigable waters, it can

660. State *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 582 P.2d 1352 (Or. 1978).

661. Shively v. Bowlby, 152 U.S. 1, 14–15, 26 (1897) (involving the Columbia River).

662. OR. REV. STAT. §§ 274.025(1), 274.005; *see also* Hinman v. Warren, 6 Or. 408, 412 (Or. 1877) (concluding that the high tide line is the property line for properties along the Columbia River, regardless of what the grant says); Parker v. W. Coast Packing Co., 21 P. 822, 824 (Or. 1889) (holding that the state owns submerged lands on a navigable river to the high water mark); Oregon v. Portland Gen. Elec. Co., 95 P. 722, 728–29 (Or. 1908) (same).

663. Smith Tug & Barge Co. v. Columbia Pac. Towing Corp., 443 P.2d 205, 207–18 (Or. 1958) (reviewing the history of Oregon's case law on the subject).

664. *Id.* at 218.

665. Morse v. Oregon Div. of State Lands, 581 P.2d 520, 523 (Or. App. 1978), *aff'd*, 590 P.2d 709 (Or. 1979).

666. Or. Shores Conservation Coal. v. Or. Fish & Wildlife Comm'n, 662 P.2d 356, 364 (Or. Ct. App. 1983); *see also* Wilson v. Welch, 7 P. 341, 344 (Or. 1885) ("The state does own the channel of the navigable river within its boundaries, and the shore of its bays, harbors, and inlets between high and low water, but its ownership is a trust for the public.").

667. Hume v. Rogue River Packing Co., 92 P. 1065, 1072–73 (Or. 1907); *see also* Johnson v. Hoy, 47 P.2d 252, 252 (Or. 1935) (holding that the Legislature cannot grant an exclusive right to fish for salmon).

regulate fishing.[668] Specifically, fishing methods can be enjoined if they interfere with the public's common right of fishing.[669]

Under the public trust doctrine, "[w]hile certain of the state's interests are alienable, its obligation as trustee of the public interest remains. . . . Thus, all submerged and submersible lands are subject to the paramount responsibility of the state to preserve and protect the public interest."[670] Like California, Oregon views waters as a limited and precious resource:

> The severe restriction on the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands, but upon the exhaustible and irreplaceable nature of the resources and its fundamental important to our society and our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.[671]

As a result, the purpose of a private use of navigable waters is critical to whether the use may be allowed under the public trust doctrine. Following *Illinois Central Railroad*, the Oregon courts have concluded "that water resources should be devoted to uses which are consistent with their nature and should be protected from inimical uses."[672] Undertakings in furtherance of and consistent with the trust, "such as the construction of wharves, docks and piers," are permitted, while "upland-related activities which consume water resources by adapting them to uncharacteristic uses" must be examined more closely.[673] However, to the extent that the Oregon public trust doctrine prohibits some uses, it "does not prohibit [activities] other than water-related uses . . . ."[674] Moreover, the State Lands Board does not give up the jus publicum in leasing submerged lands.[675]

668. Oregon v. Nielsen, 95 P. 720, 722 (Or. 1908); Antony v. Veatch, 220 P.2d 493, 498–99 (Or. 1950).

669. Radich v. Frederckson, 10 P.2d 352, 355 (Or. 1932); *Johnson*, 47 P.2d at 252.

670. *Morse*, 581 P.2d at 524.

671. *Id.*

672. *Id.* at 525.

673. *Id.* For an earlier review of Oregon's public trust doctrine, see generally Michael B. Huston, *The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623 (1989). For an argument in favor of expanding that doctrine, see generally Scott B. Yates, Comment, *A Case For the Extension of the Public Trust Doctrine in Oregon*, 27 ENVTL. L. 663 (1997).

674. Morse v. Oregon Div. of State Lands, 590 P.2d 709, 711 (Or. 1979); *see also* Cook v. Dabney, 139 P. 721, 722 (Or. 1914) (holding that the Oregon State Lands Board cannot convey submerged lands "in a manner and for a purpose which would act as a direct and permanent impediment to navigation," because doing so would violate the public trust doctrine); Hinman v. Warren, 6 Or. 408, 412 (1877) (holding that the State "has no authority to dispose of its tidelands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets and the like. The grantees of the state [to properties along the Columbia River] took the land subject to every easement growing out of the right of navigation inherent in the public."); Bowlby v. Shively, 30 P. 154, 160 (Or. 1892), *aff'd*, 152

Oregon's Water Rights Act explicitly acknowledges the public trust doctrine and prohibits instream water rights from diminishing public rights in waters under that doctrine.[676] Moreover, under Oregon case law, private landowners cannot divert navigable-in-fact rivers subject to public use rights.[677]

Oregon statutes extend public rights to any waters made navigable by the state[678] and to non-navigable, privately owned waters that can float boats, rafts or logs.[679] The private owner cannot deny the public its right of navigation, including the right to bypass obstructions by traveling over private land, but the public has only an "incidental" right to "meddle" with the privately owned banks.[680]

In addition, the public has acquired the right to use the dry sand portions of beaches through the doctrine of custom.[681] As a result, there is no taking of private property when the state denies landowners permits to build sea walls.[682]

SOUTH DAKOTA

Date of Statehood: 1889

Water Law System: Prior appropriation

South Dakota Constitution: The South Dakota Constitution has no provisions relevant to the public trust doctrine.

South Dakota Statutes:

- S.D. COD. L. § 1-2-8: South Dakota-Nebraska Boundary Compact.
- S.D. COD. L. § 8-03: "The public has a right to use the strip of land 50 feet landward from all navigable waters provided the strip is

U.S. 1 (1894) (holding that the state can dispose of tidelands, but only subject "to the paramount right of navigation and commerce," and "the owner of the upland or tide water has certain rights, arising from his adjacency to such waters, subordinate, however, to their use by the public for navigation and fishing").

675. Brusco Tugboat Co. v. Oregon, 589 P.2d 712, 718 (Or. 1978).

676. OR. REV. STAT. § 537.334(2) (2009).

677. Shaw v. Oswego Iron Co., 10 Or. 371, 383 (1882).

678. OR. REV. STAT. § 780.030.

679. Weise v. Smith, 3 Or. 445, 449 (1869).

680. *Id.* at 450.

681. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 673–78 (Or. 1969). For an argument that the public trust doctrine still plays a role in protecting public rights in Oregon's beaches, see generally Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731 (1992).

682. Stevens v. City of Cannon Beach, 854 P.2d 449, 451 (Or. 1993).

between the ordinary high water mark and ordinary low water mark of public bodies of water."

- S.D. COD. L. Chapter 34A-10: Environmental Protection Act. This act creates a private right of action "for the protection of the air, water, and other natural resources *and the public trust therein* from pollution, impairment, or destruction."[683] Similarly, agencies can allow parties to intervene in agency proceedings if the proceeding in question "involves conduct which has the effect of polluting, impairing, or destroying the air, water, or other natural resources *or the public trust therein*."[684] The act also allows the courts to "grant temporary equitable relief where necessary for the protection of the air, water, and other natural resources *or the public trust therein* from pollution, impairment, or destruction,"[685] and requires the courts to "adjudicate the impact of the defendant's conduct on the air, water, or other natural resources *and on the public trust therein* in accordance with this chapter."[686] In both administrative and judicial proceedings, "any alleged pollution, impairment, or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare."[687] Courts may "grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust therein from pollution, impairment, or destruction."[688]
- S.D. COD. L. Title 43, Chapter 17: Water Boundaries and Riparian Lands. "The ownership of land below ordinary high-water mark, and of land below the water of a navigable lake or stream, is regulated by the laws of the United States or by such laws of the state as the Legislature may enact."[689] "Unless the grant under which the land is held indicates a different intent, the owner of the upland, if it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark. All navigable rivers and lakes are public highways within fifty feet landward from the water's nearest edge, provided that the outer boundary of such public highway may not expand beyond the ordinary high water mark and may not contract within the ordinary low water mark, and

683. S.D. CODIFIED LAWS § 34A-10-1 (2009) (emphasis added).
684. *Id.* § 34A-10-2 (emphasis added).
685. *Id.* § 34A-10-5 (emphasis added).
686. *Id.* § 34A-10-7 (emphasis added).
687. *Id.* § 34A-10-8.
688. *Id.* § 34A-10-11.
689. *Id.* § 43-17-1.

subject to §§ 43-17-29, 43-17-31, 43-17-32, and 43-17-33."[690] "In all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."[691] "The Water Management Board shall establish . . . the ordinary high water mark and install benchmarks and may establish the ordinary low water mark on public lakes which are used for public purposes including, but not limited to boating, fishing, swimming, hunting, skating, picnicking, and similar recreational pursuits."[692] "If any water level rises above the ordinary high water mark of a navigable lake, the right of the public to enjoyment of the entire lake may not be limited, except that access to the lake shall be by public right-of-way or by permission of the riparian landowner . . . ."[693] "A stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period between the first of May to the thirtieth of September, inclusive, in two out of every ten years. A dry draw, as defined in § 46-1-6, is not navigable. This section does not apply to any stream or portion of a stream which is navigable pursuant to federal law. Any person may petition the Water Management Board for a declaratory ruling as to the navigability of any stream, or portion of a stream, in this state."[694] Under certain circumstances, riparian owners can fence navigable waters.[695] However, the fence must be constructed so "that the right of the public to utilize the navigable stream is not prohibited or unduly restricted."[696] Moreover, the right to fence "does not apply to any river or stream or portion of any river or stream that has been determined to be navigable pursuant to federal law."[697]

- S.D. COD. L. Title 46, Chapter 1: Water Resources Act: Definitions and General Provisions. Under these provisions, "the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."[698] Moreover, "all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law."[699] "[B]ecause of conditions prevailing in this state the general welfare

690. *Id.* § 43-17-2.
691. *Id.* § 43-17-4.
692. *Id.* § 43-17-21.
693. *Id.* § 43-17-29.
694. *Id.* § 43-17-34.
695. *Id.* § 43-17-35.
696. *Id.*
697. *Id.*
698. *Id.* § 46-1-1.
699. *Id.* § 46-1-3.

requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water."[700] Domestic use takes precedence.[701]

- S.D. COD. L. Title 46, Chapter 2: Water Resources Act: Water Management Board and Chief Engineer.
- S.D. COD. L. Title 46, Chapter 2A: Water Resources Act: Administrative Procedure for Appropriation of Water.
- S.D. COD. L. Title 46, Chapter 3A: Water Resources Act: Weather Modification Activities.
- S.D. COD. L. Title 46, Chapter 4: Water Resources Act: Dry-Draw and Nonnavigable Stream Dams.
- S.D. COD. L. Title 46, Chapter 5: Water Resources Act: Appropriation of Water.
- S.D. COD. L. Title 46, Chapter 6: Water Resources Act: Groundwater and Wells.
- S.D. COD. L. Title 46, Chapter 7: Water Resources Act: Storage, Diversion, and Irrigation Works.
- S.D. COD. L. Title 46, Chapter 8: Water Resources Act: Eminent Domain.
- S.D. COD. L. Title 46, Chapter 10: Water Resources Act: Adjudication of Water Rights.
- S.D. COD. L. Title 46, Chapter 10A: Water Resources Act: Water Use Control Areas.
- S.D. COD. L. Title 46, Chapter 12: Water Resources Act: Irrigation Districts.

Definition of "Navigable Waters":

South Dakota recognizes several categories of navigable waters. The test of navigability for title purposes under the equal footing doctrine is a federal

700. *Id.* § 46-1-4.
701. *Id.* § 46-1-5.

test.[702] According to the South Dakota Supreme Court, the ebb-and-flow tidal test of title navigability is not useful in South Dakota.[703] Instead, the state uses the navigable-in-fact test for other waters.[704] Under this test, Lake Albert is navigable.[705] In addition, by statute, South Dakota has identified the Missouri River, James River, Boise des Sioux River, and the lower five miles of the Big Sioux River as being federally navigable.[706]

For purposes of determining whether the public has rights to use waters, South Dakota uses a common law "pleasure boat" test for navigability.[707] For public use purposes, "whether or not waters are navigable depends upon the natural availability of waters for public purposes taking into consideration the natural character and surroundings of a lake or stream. This division of lakes and streams into navigable and nonnavigable is the equivalent of classification of public and private waters."[708]

By statute, South Dakota defines "navigable water" for public use purposes to be "[a] stream, or portion of a stream [that] can support a vessel capable of carrying one or more persons throughout the period between the first of May to the thirtieth of September, inclusive, in two out of every ten years."[709] However, this definition "does not apply to any stream or portion of a stream which is navigable pursuant to federal law."[710]

Rights in "Navigable Waters":

Fairly continuously under South Dakota's statutes, private landowners have owned navigable waters to the low-water mark.[711] However, the landowner's title is "absolute" only to the high water mark; title to lands between the high water and low water marks is subject to the rights of the public.[712] The public has access to and a right to use these lands for "navigating, boating, fishing, fowling, and like public uses."[713] Nevertheless,

702. Parks v. Cooper, 676 N.W.2d 823, 829–31 (S.D. 2004).
703. Flisrand v. Madson, 152 N.W. 796, 799 (S.D. 1912).
704. *Id.* at 799–800.
705. *Id.*
706. S.D. CODIFIED LAWS § 43-17-38.
707. *Parks*, 676 N.W.2d at 830–31 (citing Hillebrand v. Knapp, 274 N.W. 821 (S.D. 1937)).
708. *Hillebrand*, 274 N.W. at 822.
709. S.D. CODIFIED LAWS § 43-17-34.
710. *Id.*
711. Flisrand v. Madson, 152 N.W. 796, 799 (S.D. 1912) (citing CIV. CODE § 289); S.D. CODIFIED LAWS § 43-17-2.
712. *Flisrand*, 152 N.W. at 799 (citing CIV. CODE § 289); S.D. CODIFIED LAWS § 43-17-2.
713. *Flisrand*, 152 N.W. at 799 (citing CIV. CODE § 289); S.D. CODIFIED LAWS § 43-17-2; *see also Hillebrand*, 274 N.W. at 822 (listing sailing, rowing, fishing, fowling, bathing, skating, taking water, and cutting ice as public uses).

the ordinary high water mark can migrate, and public rights follow natural changes in the waterway.[714]

In contrast, at common law, landowners have "absolute ownership" of the beds of non-federally navigable waters.[715] However, under current statutes,

> [u]nless the grant under which the land is held indicates a different intent, the owner of the upland, if it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark. All navigable rivers and lakes are public highways within fifty feet landward from the water's nearest edge, provided that the outer boundary of such public highway may not expand beyond the ordinary high water mark and may not contract within the ordinary low water mark . . . .[716]

For federally navigable waters, "[o]nce the beds of the navigable waters are in state ownership, they are held subject to a public trust and cannot be conveyed unless it would promote a public trust purpose."[717]

As in many western states, public ownership of water for prior appropriation purposes is becoming relevant to public rights in non-navigable waters in South Dakota. Recently, the South Dakota Supreme Court declared that "[n]ever in South Dakota has determining the navigability of a water body been a matter of deciding if the water itself is public or private."[718] Instead, under the Desert Land Act of 1877,[719] non-navigable waters became subject to state control.[720] When the legislature adopted the prior appropriation doctrine in 1905, it qualified riparian owners' rights to the water, and several states have recognized public rights in water despite private ownership of the bed, including Idaho, Montana, New Mexico, Wyoming, Minnesota, North Dakota, and Iowa.[721] Moreover, in 1955 the South Dakota Legislature confirmed that all water is public property.[722] As a result, the Water Resources Act works in tandem with the public trust doctrine:

> [W]hile we regard the public trust doctrine and Water Resources Act as having shared principles, the Act does not supplant the scope of the public trust doctrine. The Water Resources Act evinces a legislative intent both to allocate and regulate water resources. In part, this Act codifies public trust

714. S.D. Wildlife Fed'n v. Water Mgmt. Bd., 382 N.W.2d 26, 31–32 (S.D. 1986).

715. *Flisrand*, 152 N.W. at 799, 801.

716. S.D. CODIFIED LAWS. § 43-17-2.

717. Parks v. Cooper, 676 N.W.2d 823, 829 (S.D. 2004) (declaring *Illinois Central Railroad Co.* to be the first definition of the public trust doctrine); *Flisrand*, 152 N.W. at 799–800.

718. *Parks*, 676 N.W.2d at 829. For a more extensive discussion of this case, see generally Janice Holmes, Note, *Following the Crowd: The Supreme Court of South Dakota Expands the Scope of the Public Trust Doctrine to Non-Navigable, Non-Meandered Bodies of Water in Parks v. Cooper*, 38 CREIGHTON L. REV. 1317 (2005).

719. 43 U.S.C. §§ 321–23 (2006).

720. *Parks*, 676 N.W.2d. at 831–32 (citing Cal. Or. Power Co. v. Beaver Cement Co., 295 U.S. 142, 162–64 (1935)).

721. *Id.* at 833–36.

722. *Id.* at 837.

> principles. The first three sections of the Act embody the core principles of the public trust doctrine—"the people of the state have a paramount interest in the use of all the water of the state," SDCL 46-1-1; "the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit," SDCL 46-1-2; and "all water within the state is the property of the people of the state." SDCL 46-1-3.[723]

Thus, even when increased precipitation creates new lakes over private property that had never really existed before, "the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public," and the public trust doctrine applies independently of bed ownership.[724] "[A]ll waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public."[725] The public purposes for which these lakes can be used potentially include, but are not limited to, "boating, fishing, swimming, hunting, skating, picnicking, and similar recreational pursuits."[726] However, the court noted, it would be better for the Department of Environment and Natural Resources to regulate public recreational use of new non-navigable lakes, because "it is ultimately up to the Legislature to decide how these [new] waters are to be beneficially used in the public interest" and to carry out these policies "through a coordination of all state agencies and resources."[727]

South Dakota's Environmental Protection Act also embodies the public trust doctrine.[728] This act "authoriz[es] legal action to protect 'the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.'"[729]

TEXAS

Date of Statehood: 1845

Water Law System: Prior appropriation after 1895[730]

Texas Constitution: The Texas Court of Appeals recently indicated that Article XVI, § 59(a) of the Texas Constitution is relevant to the public trust doctrine.[731] This provision states:

723. *Id.* at 838.
724. *Id.*
725. *Id.* at 838–39.
726. *Id.* at 840 (citing S.D. CODIFIED LAWS § 43-17-21).
727. *Id.* at 841.
728. *Id.* at 838.
729. *Id.* (quoting S.D. CODIFIED LAWS § 34A-10-1).
730. TEX. WATER CODE ANN. § 11.001(b) (Vernon 2009).
731. Cummins v. Travis County Water Control & Improvement Dist. No. 17, 175 S.W.3d 34, 49 (Tex. App. 2005).

> The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semiarid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.[732]

No other provisions of the Texas Constitution discuss rights in water.

Texas Statutes:

- TEX. NAT. RES. CODE ANN. § 21.001: This provision defines a "navigable stream" to be "a stream which retains an average width of 30 feet from the mouth up."
- TEX. NAT. RES. CODE ANN., Chapter 33: Coastal Public Lands Management Act of 1973. "The natural resources of the surface estate in coastal public land shall be preserved. These resources include the natural aesthetic values of those areas and the value of the areas in their natural state for the protection and nurture of all types of marine life and wildlife."[733] "Uses which the public at large may enjoy and in which the public at large may participate shall take priority over those uses which are limited to fewer individuals."[734] "The public interest in navigation in the intracoastal water shall be protected."[735] "'Coastal public land' means all or any portion of state-owned submerged land, the water overlying that land, and all state-owned islands or portions of islands in the coastal area."[736] "'Submerged land' means any land extending from the boundary between the land of the state and the littoral owners seaward to the low-water mark on any saltwater lake, bay, inlet, estuary, or inland water within the tidewater limits, and any land lying beneath the body of water, but for the purposes of this chapter only, shall exclude beaches bordering on and the water of the open Gulf of Mexico and the land lying beneath this water."[737] The act

732. TEX. CONST., art. XVI, § 59(a).
733. TEX. NAT. RES. CODE ANN. § 33.001(b) (Vernon 2009).
734. *Id.* § 33.001(c).
735. *Id.* § 33.001(d).
736. *Id.* § 33.004(6).
737. *Id.* § 33.004(11).

provides for a Coastal Management Program.[738] Although the act allows for leasing of coastal public land, "[m]embers of the public may not be excluded from coastal public land leased for public recreational purposes or from an estuarine preserve."[739]

- TEX. NAT. RES. CODE ANN. §§ 61.001–61.26: Texas Open Beaches Act. "It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico."[740] "'Beach' means state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public."[741] This act was upheld in *Moody v. White*.[742]
- TEX. NAT. RES. CODE ANN. § 134.006: This provision of the Texas Surface Coal Mining and Reclamation Act ensures that the Act "does not affect the right of a person under other law to enforce or protect the person's interest in water resources affected by a surface coal mining operation."
- TEX. PARKS & WILD. CODE ANN. § 90.001: This provision defines "navigable river or stream" to be "a river or stream that retains an average width of 30 or more feet from the mouth or confluence up."
- TEX. WATER CODE ANN., Chapter 11: Water Rights. "The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state."[743] The right to appropriate can be subordinate to instream flow needs.[744] "The waters of the state are held in trust for the public, and the right to use state water may

738. *Id.* § 33.053.
739. *Id.* § 33.108.
740. *Id.* § 61.011(a).
741. *Id.* § 61.012.
742. 593 S.W.2d 372, 379–80 (Tex. Civ. App. 1980).
743. TEX. WATER CODE ANN. § 11.021(a) (Vernon 2009).
744. *Id.* § 11.023(a).

> be appropriated only as expressly authorized by law."[745] Moreover, "[m]aintaining the biological soundness of the state's rivers, lakes, bays, and estuaries is of great importance to the public's economic health and general well-being. The legislature encourages voluntary water and land stewardship to benefit the water in the state,"[746] and "[t]he legislature has expressly required the commission while balancing all other public interests to consider and, to the extent practicable, provide for the freshwater inflows and instream flows necessary to maintain the viability of the state's streams, rivers, and bay and estuary systems in the commission's regular granting of permits for the use of state waters."[747] Water rights can be taken by eminent domain.[748] The Water Code provides for pro rata distribution of water during shortages.[749] Obstruction of navigable streams is prohibited.[750]

Definition of "Navigable Waters":

Texas follows the tidal test of navigability for title purposes, and, as such, "[t]he bays, inlets, and other waters along the Gulf Coast which are subject to the ebb and flow of the tide of the Gulf of Mexico are defined as 'navigable waters.'"[751] Applying this test, the Texas Supreme Court noted that Tres Palacios Bay was an arm of the Gulf of Mexico and thus held it navigable for title purposes.[752]

However, Texas also follows the navigable-in-fact test.[753] "[S]treams or lakes . . . are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . . ."[754] Moreover, the courts consider the navigability test "broad" because navigable waters in Texas "include waters

745. *Id.* § 11.0235(a).
746. *Id.* § 11.0235(b).
747. *Id.* § 11.0235(c).
748. *Id.* § 11.033.
749. *Id.* § 11.039.
750. *Id.* § 11.096.
751. Lorino v. Crawford Packing Co., 175 S.W.2d 410, 411 (Tex. 1943) (citing City of Galveston v. Mann, 143 S.W.2d 1028, 1033 (Tex. 1940); Crary v. Port Arthur Channel & Dock Co., 47 S.W. 967, 970 (Tex. 1898)); Butler v. Sadler, 399 S.W.2d 411, 415 (Tex. Civ. App. 1966).
752. *Lorino*, 175 S.W.2d at 411 (citing Texas v. Bradford, 50 S.W.2d 1065, 1069 (Tex. 1932)).
753. TH Invs., Inc. v. Kirby Inland Marine, 218 S.W.3d 173, 182 n.7 (Tex. App. 2007) (citations omitted); Diversion Lake Club v. Heath, 86 S.W.2d 441, 443–44 (Texas 1935).
754. Hix v. Robertson, 211 S.W.3d 423, 428 n.3 (Tex. App. 2006) (quoting Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 129 (Tex. Civ. App. 1935) (quoting United States v. Holt State Bank, 270 U.S. 49, 56 (1926))).

within the tidewater limits of the Gulf of Mexico and streams that are navigable in law or fact."[755]

Nevertheless, "[e]very inland lake or pond that has the capacity to float a boat is not necessarily navigable. It must be of such size and so situated as to be generally and commonly useful as a highway for transportation of goods or passengers between the points connected thereby."[756] Thus, even though boats could float on Stanmire Lake, the lake could not practically be used for commerce, and hence it was not navigable.[757] Conversely, under this test, as well as the tidal test, the Old River and San Jacinto River are navigable.[758] In addition, the Colorado River is navigable, and the state owns its bed.[759]

By statute, Texas has defined "navigable stream" to be a river or stream "which retains an average width of 30 feet from the mouth up."[760] While the Texas Court of Appeals referenced this definition in a recent case in connection with title navigability,[761] the real "effect of this statute is to render all streams navigable in law that have an average width of 30 feet, regardless of ownership of the bed of the streams and regardless of whether they are actually navigable."[762] Thus, creeks not navigable in fact can still be subject to public use under these statutes.[763] This legislation dates back to 1929 and was enacted "because survey lines has incorrectly crossed navigable streams," and the legislation "sought to rectify those errors by relinquishing title in the streambeds while reserving the public's right to the waters of navigable streams."[764] However, versions of the thirty-foot rule have actually existed in Texas since 1837.[765] Public rights in these waters include navigation, fishing, recreation, and commercial uses.[766] For example, Hog Creek is a statutorily navigable stream and the public has a right to enjoy its waters, including by fishing, and those rights extend to a lake formed by damming the creek.[767]

755. *TH Invs.*, 218 S.W.3d at 182 n.7.

756. *Taylor Fishing Club*, 88 S.W.2d at 129.

757. *Id.* at 130. *But see* Weider v. Texas, 196 S.W. 868, 873 (Tex. Civ. App. 1917) (declaring Green Lake navigable because it could float boats for fishing, and discussing the "pleasure boat" and log floatation tests of navigability with approval); Orange Lumber Co. v. Thompson, 126 S.W. 604, 606 (Tex. Civ. App. 1910) (holding that log floatation was enough to make a water navigable, citing The Montello, 87 U.S. (20 Wall.) 430, 432 (1874)).

758. *Taylor Fishing Club*, 88 S.W.2d at 184.

759. Nat'l Resort Communities, Inc. v. Cain, 479 S.W.2d 341, 349–50 (Tex. Civ. App. 1972).

760. TEX. NAT. RES. CODE ANN. § 21.001 (Vernon 2009); *see also* TEX. PARKS & WILD. CODE ANN. § 90.001 (Vernon 2009).

761. TH Invs., Inc. v. Kirby Inland Marine, 218 S.W.3d 173,184 (Tex. App. 2007).

762. Tex. River Barges v. City of San Antonio, 21 S.W.3d 347, 352 (Tex. App. 2000).

763. Hix v. Robertson, 211 S.W.3d 423, 427–28 (Tex. App. 2006); *see also* Port Acres Sportsman's Club v. Mann, 541 S.W.2d 847, 848–49 (Tex. Civ. App. 1976) (holding that the Big Hill Bayou, which was deemed non-navigable in 1875, was navigable under the statute).

764. *Hix*, 211 S.W.3d at 428.

765. Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935).

766. *Tex. River Barges*, 21 S.W.3d at 352.

767. *Hix*, 211 S.W.3d at 428.

However, the adjoining lake was not navigable because the statute does not apply to lakes.[768] In addition, both the north and south forks of the Upper Guadalupe River are navigable under this statutory definition.[769]

Rights in "Navigable Waters":

"Title to land covered by the bays, inlets, and arms of the Gulf of Mexico with tidewater limits is in the State, and those lands constitute public property that is held in trust for the use and benefit of the people."[770] As such, submerged lands are different from ordinary public lands.[771] The shore is the stretch of land between the high and low water marks, and as a "settled principle of English common law," title to the shore belongs to the state.[772] Until the shore is granted, the state "holds the right, both to the water and land under the water, for the public use; and the right of passing and repassing, navigation, fishing, etc., etc., are common to all the citizens, subject of course to such general regulations as may be imposed for the general benefit."[773] Public rights include hunting, fishing, navigation, "and other lawful purposes."[774]

In common law land grants after 1840, the boundary between state and private property in tidal lands is the mean high tide line.[775] For Spanish or Mexican grants, the boundary is the mean higher high tide line,[776] which is the average of the higher of the two daily high tides over time. In contrast, "[m]ean high tide is measured by taking an average of all the daily highest readings over a long time. Mean high tide is the same as mean high water."[777] Title to islands follows title to the bed.[778]

"[T]wo presumptions arise regarding submerged lands: (1) they are owned by the State and (2) the State has not acted to divest them."[779] "[O]nly the Texas Legislature may convey submerged tidal lands."[780] However, unlike in

768. *Id.* at 428–29.

769. *In re* Adjudication of Upper Guadalupe River Segment of Guadalupe River Basin, 625 S.W.2d 353, 362–63 (Tex. App. 1981).

770. Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 57 (Tex. App. 1993); City of Corpus Christi v. Davis, 622 S.W.2d 640, 643 (Tex. App. 1981).

771. Lorino v. Crawford Packing Co., 175 S.W.2d 410, 412 (Tex. 1943).

772. City of Galveston v. Menard, 23 Tex. 349, 1859 WL 6290, at *9 (1859).

773. *Id.* at *11 (citations omitted).

774. Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935); *see generally* Michael D. Morrison, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries*, 37 BAYLOR L. REV. 365 (1985).

775. *City of Corpus Christi*, 622 S.W.2d at 643 (citing Rudder v. Ponder, 293 S.W.2d 736 (Tex. 1956)); TH Invs., Inc. v. Kirby Inland Marine, 218 S.W.3d 173,184 (Tex. App. 2007).

776. *TH Invs.*, 218 S.W.3d at 184.

777. *Id.* at 184 n.10 (citation omitted).

778. Turner v. Mullins, 162 S.W.3d 356, 361–62 (Tex. App. 2005).

779. *TH Invs.*, 218 S.W.3d at 182–83.

780. *Id.* at 183.

most states, when the State of Texas does grant submerged lands to individuals, there is no implied reservation in favor of the public trust, despite the ruling in *Illinois Central Railroad*.[781]

The state's ownership of water[782] is relevant to the operation of the public trust doctrine in Texas.[783] "The purpose of the State maintaining title to the beds and waters of all navigable bodies is to protect the public's interest in those scarce natural resources."[784] As such, "the State, as trustee, is entitled to regulate those waters and submerged lands to protect its citizens' health and safety and to conserve natural resources."[785]

There are also indications from the Texas courts that fish and other aquatic life are subject to public trust principles. As far back as 1942, the Texas Civil Court of Appeals declared:

> The waters of all natural streams of this State and all fish and other aquatic life contained in fresh water rivers, creeks, stream, and lakes or sloughs subject to overflow from rivers or other streams within the borders of this State, are declared to be the property of the State; and the Game, Fish ad Oyster Commission has jurisdiction over and control over such rivers and aquatic life. The ownership is in trust for the people . . . , and pollution of streams and water courses is condemned . . . . The Constitution of Texas, Art. 16, § 59(a) . . . designates rivers and streams as natural resources, declares that such belong to the State, and expressly invests the Legislature with the preservation and conservation of such resources.[786]

UTAH

Date of Statehood: 1890

Water Law System: Prior appropriation

781. Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 59–60 (Tex. App. 1993) (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473, 481–84 (1988); Shively v. Bowlby, 152 U.S. I, 26 (1894); City of Galveston v. Menard, 23 Tex. 349 (1859); Texas v. Lain, 349 S.W.2d 579 (Texas 1961)); City of Galveston v. Menard, 23 Tex. 349, 1859 WL 6290, at *12 (1859).

782. TEX WATER CODE ANN. § 11.021(a) (Vernon 2009).

783. Cummins v. Travis County Water Control & Improvement Dist., 175 S.W.2d 34, 48 (Tex. App. 2005). For a lengthier discussion of this case, see generally Amy Mockenhaupt, Cummins v. Travis County Water Control and Improvement Dist., *175 S.W.3d 34 (Tex. App. 2005)*, 9 U. DENV. WATER L. REV. 269 (2005).

784. *Cummins*, 175 S.W.2d at 49.

785. *Id.* (citing Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942)); *see also* Carruthers v. Terramar Beach Cmty. Improvement Ass'n, Inc., 645 S.W.2d 772, 774 (Tex. 1983) ("The waters of public navigable streams are held by the State in trust for the public, primarily for navigation purposes." (citing Motl v. Boyd, 286 S.W. 458 (Tex. 1926))).

786. *Goldsmith & Powell*, 159 S.W.2d at 535.

Utah Constitution: Utah has not constitutionalized its public trust doctrine. However, several provisions of the Utah Constitution are relevant. These include:

- Art. XI, § 6: "No municipal corporation, shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, That nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water-rights, or sources of water supply, for other water-rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants."
- Art. XVII, § 1: "All existing rights to the use of any of the waters in the State for any useful or beneficial purpose, are hereby recognized and confirmed."
- Art. XX, § 1: "All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."

Utah Statutes:

- UTAH CODE ANN. § 23-21-4(1): "[T]here is reserved to the public the right of access to all lands owned by the state, including those lands lying below the official government meander line of navigable waters, for the purpose of hunting, trapping, or fishing."
- UTAH CODE ANN. § 57-9-6(5): The Marketable Record Title Act does not apply to sovereign lands.
- UTAH CODE ANN. § 63-34-3.2: Wetlands Protection Account. "Funds in the Wetlands Protect Account may be used in accordance with the public trust doctrine."[787]
- UTAH CODE ANN. § 65A-1-1: This provision defines "public trust assets" to be "those lands and resources, including sovereign lands, administered by the" Division of Forestry, Fire, and State Lands.[788]

787. UTAH CODE ANN. § 79-2-305(3) (2009).
788. *Id.* § 65A-1-1(4).

"Sovereign lands," in turn, are "those lands lying below the ordinary high water mark of navigable bodies of water at the date of statehood and owned by the state by virtue of its sovereignty."[789]

- UTAH CODE ANN. § 65A-2-5: The Division of Forestry, Fire, and State Lands (DFFSL) can limit public use of leased parcels of sovereign lands to protect lessees from hunting, trapping, or fishing.
- UTAH CODE ANN. § 65A-10-1: The DFFSL "is the management authority for sovereign lands, and may exchange, sell, or lease sovereign lands but only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust."[790] "Nothing in this section shall be construed as asserting state ownership of the beds of nonnavigable lakes, bays, rivers, or streams."[791]
- UTAH CODE ANN. § 65A-10-2(1): The DFFSL, "with the approval of the executive director of the Department of Natural Resources and the governor, may set aside for public or recreational use any part of the lands claimed by the state as the beds of lakes or streams."
- UTAH CODE ANN. § 65A-10-3: This provision allows for agreements and establishes dispute resolution procedures to establish boundaries of sovereign lands.
- UTAH CODE ANN. § 65A-10-8: This provision provides for management of the Great Salt Lake.
- UTAH CODE ANN. § 73-1-1: "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."
- UTAH CODE ANN. § 73-1-5: "The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use."
- UTAH CODE ANN. §§ 73-3-1 to 73-3-31: Appropriation of Water. "Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere

789. *Id.* § 65A-1-1(5).
790. *Id.* § 65A-10-1(1).
791. *Id.* § 65A-10-1(2).

> with a more beneficial use of such water, the application shall be dealt with as provided in Section 73-3-8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."[792]

Definition of "Navigable Waters":

Utah has provided the U.S. Supreme Court with several occasions to discuss the definition of navigability that gives states title to the beds and banks of navigable waters. For example, in litigation regarding title to the Green River, the Grand River, and the Colorado River in Utah, the U.S. Supreme Court affirmed that states received title to the beds and banks of navigable waters upon statehood, while the federal government retained title to the beds and banks of non-navigable waters.[793] The question of title navigability is a federal question, and hence the fact that the Utah Legislature in 1927 passed legislation declaring these three rivers navigable was irrelevant.[794] Summarizing its prior case law, the U.S. Supreme Court stated that:

> The test of navigability has frequently been stated by this Court. In *The Daniel Ball*, 10 Wall. 557, 563 . . . , the Court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In *The Montello*, 20 Wall. 430, 441 . . . , it was pointed out that "the true test of navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation," and that "it would be a narrow rule to hold that in this country, unless a river was capable of being navigation by steam or sail vessels, it could not be treated as a public highway." The principles thus laid down have recently been restated in *United States v. Holt State Bank*, 270 U.S. 49, 56 . . . , where the Court said:
>
> > 'The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor an absence of occasional difficulties in navigation, but the fact, if it be a fact, that the

792. *Id.* § 73-3-1.
793. United States v. Utah, 283 U.S. 64, 75 (1931).
794. *Id.* at 75 & n.6.

> stream in its natural and ordinary condition affords a channel for useful commerce.'[795]

Moreover, "[t]he extent of existing commerce is not the test."[796]

Under this test, all three rivers were declared navigable, and Utah owns their beds and banks.[797] Similarly, the Great Salt Lake is navigable and owned by Utah.[798] According to the U.S. Supreme Court, "the fact that the Great Salt Lake is not a part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed."[799] Finally, Utah owns the bed and banks of Utah Lake, another navigable lake.[800]

In 1927, the Utah Supreme Court rejected the English ebb-and-flow tidal test of navigability.[801] According to that court's most recent definition of navigability, a body of water is navigable for title purposes "if it is useful for commerce and has 'practical usefulness to the public as a public highway' . . . ."[802] In contrast, "[a] theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient."[803] Under this test, Scipio Lake was not navigable because the lake was not, and was not likely to become, "a valuable factor in commerce."[804]

Rights in "Navigable Waters":

In waters navigable for title purposes, private landowners own only to the high water mark, often deemed the equivalent of the meander line.[805] The high water mark is "the mark on the land where valuable vegetation ceased to grow because the land was inundated by water for long periods of time."[806]

795. *Id.* at 76.

796. *Id.* at 82.

797. *Id.* at 89.

798. Utah v. United States, 403 U.S. 9, 10 (1971); *see also* Morton, Int'l, Inc. v. S. Pac. Transp. Co., 495 P.2d 31, 34 (Utah 1972) ("The Great Salt Lake is the property of Utah subject only to regulation of navigation by Congress."); Utah State Road Comm'n v. Hardy Salt Co., 486 P.2d 391, 392 (Utah 1971) (declaring the Great Salt Lake navigable under the Equal Footing Doctrine); Deseret Livestock Co. v. Utah, 171 P.2d 401, 403 (Utah 1946) (declaring the Great Salt Lake navigable under the principles of *United States v. Utah*, 283 U.S. at 89).

799. *Utah v. United States*, 403 U.S. at 10 (citations omitted).

800. Utah Div. of State Lands v. United States, 482 U.S. 193, 203–09 (1987); *see also* Utah v. Rollo, 262 P. 987, 989–90 (Utah 1927) (declaring Utah Lake navigable under the rules of United States v. Holt State Bank, 270 U.S. 49 (1926) and Shively v. Bowlby, 152 U.S. 1 (1894)).

801. *Rollo*, 262 P. at 991–92.

802. Conater v. Johnson, 194 P.3d 897, 899–900 (Utah 2008) (quoting Monroe v. Utah, 175 P.2d 759, 761 (Utah 1946) (quoting Harrison v. Fite, 148 F. 781, 784 (8th Cir. 1906))).

803. *Monroe*, 175 P.2d at 761.

804. *Id.* at 762.

805. Provo City v. Jacobsen, 217 P.2d 577, 578 (Utah 1950); *see also* UTAH CODE ANN. § 23-21-4(1) (2009) (citing the meander line as the line for public rights); UTAH CODE ANN. § 65A-1-1(5) (citing the high water mark as the boundary of sovereign lands). *But see* Knudsen v. Omanson, 37 P. 250, 251 (Utah 1894) (emphasizing that the border is the water line, not the meander line).

806. *Provo City*, 217 P.2d at 578.

For navigable waters and sovereign lands in Utah, the essence of the public trust doctrine, as expressed in *Illinois Central Railroad*, "is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing."[807] Deciding whether a conveyance of sovereign lands to a private party was in the public interest is a question of fact for trial.[808]

Public ownership of the water itself has expanded the scope of Utah's public trust doctrine by giving the public rights to use non-navigable waters. Under Utah Code Annotated § 73-1-1, waters are owned by the public. The Utah Supreme Court has explained that:

> Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole.[809]

Thus:

> Under this "doctrine of public ownership," the public owns state waters and has "an easement over the water regardless of who owns the water bed beneath." In granting this public this easement, "state policy recognizes an interest of the public in the use of state waters for recreational purposes." This court has enumerated the specific recreational rights that are within the easement's scope. They include "the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water."[810]

Bed ownership is thus irrelevant for the public's rights to use waters in the state.[811] Moreover, "the scope of the public's easement in state waters provides the public the right to engage in all recreational activities that *utilize* the water and does not limit the public to activities that can be performed *upon* the water."[812] As a result, "the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement."[813]

Utah appears to have extended its public trust doctrine to ecological protection. As the Utah Supreme Court has explained,

> The 'public trust' doctrine . . . protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large.

807. Colman v. Utah State Land Bd., 795 P.2d 622, 635 (Utah 1990) (citing Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983)).

808. *Id.* at 635–36.

809. JJNP Co. v. Utah, 655 P.2d 1133, 1136 (Utah 1982).

810. Conater v. Johnson, 194 P.3d 897, 899–900 (Utah 2008) (quoting *JJNP Co.*, 655 P.2d at 1137). *See generally* Teresa Mareck, *Searching for the Public Trust Doctrine in Utah Water Law*, 15 J. ENERGY, NATURAL RES., & ENVTL. L. 321 (1995).

811. *Conater*, 194 P.3d at 899–900.

812. *Id.* at 901.

813. *Id.* at 901–02 (limiting criminal trespass liability for water users).

The public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts, such as school trust lands.[814]

WASHINGTON

Date of Statehood: 1889

Water Law System: Prior appropriation. However, existing riparian rights have been protected, especially with respect to non-navigable waters.[815] With respect to navigable waters, "the state's title to the beds and shores of navigable lakes and streams is paramount and absolute, and . . . an abutting owner has no riparian or littoral right in the waters or shores of the stream."[816]

Washington Constitution: Washington has constitutionalized some of its public trust doctrine, particularly with regard to state ownership of submerged lands and the *Illinois Central Railroad* limitation on conveyances of submerged lands. Moreover, several provisions of the Washington Constitution are relevant to water and submerged lands. These include:

- Art. XV, § 1: "The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."
- Art. XV, § 2: Leases for wharves and docks in harbors and tidal waters are limited to 30 years.
- Art. XVII, § 1: "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

814. Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 919 (Utah 1993).

815. City of New Whatcom v. Fairhaven Land Co., 64 P. 735, 738 (Wash. 1901).

816. Hill v. Newell, 149 P. 951, 952 (Wash. 1915); *see also* Eisenbach v. Hatfield, 26 P. 539, 541–42 (Wash. 1891) (holding that there are no riparian rights on navigable waters).

- Art. XVII, § 2: "The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided*, the same is not impeached for fraud."
- Art. XXI, § 1: "The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."

Washington Statutes:

- WASH. REV. CODE § 79.02.010(1): "Aquatic lands" are "all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters as defined in chapter 79.90 RCW that are administered by the [D]epartment [of Natural Resources]."
- WASH. REV. CODE § 79.02.095: Normal public lands statutes do not apply to state tidelands, shorelands, harbor areas, and the beds of navigable waters.
- WASH. REV. CODE § 79.100.010(2): For purposes of dealing with derelict vessels, "aquatic lands" are "all tidelands, shorelands, harbor areas, and the beds of navigable waters, including lands owned by the state and lands owned by other public or private entities."
- WASH. REV. CODE §§ 79.105.001 to 79.105.904: Aquatic Lands. "Aquatic lands" are "all tidelands, shorelands, harbor areas, and the beds of navigable waters."[817] "Beds of navigable waters" are "those lands lying waterward of and below the line of navigability on rivers and lakes not subject to tidal flow, or extreme low tide mark in navigable tidal waters, or the outer harbor line where harbor area has been created."[818] "First-class shorelands" are "the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or inner harbor line where established and within or in front of the corporate limits of any city or within two miles of either side."[819] "The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage."[820] The state is to manage aquatic lands to encourage public use and access and to ensure environmental protection.[821] Moreover, in managing aquatic lands, the state "shall preserve and enhance water-dependent uses," which are favored over non-water dependent use; highest priority goes to "uses which enhance renewable resources, water-borne commerce, and the navigational

817. WASH. REV. CODE § 79.105.060(1) (2009).
818. *Id.* § 79.105.060(2).
819. *Id.* § 79.105.060(3).
820. *Id.* § 79.105.010.
821. *Id.* § 79.105.030.

and biological capacity of the waters . . . ."[822] Specifically, the Department must consider the value of state-owned aquatic lands "as wildlife habitat, natural area preserve, representative ecosystem, or spawning area" before leasing the lands or allowing changes in use.[823] Sales and leases of these lands are allowed but require a permit.[824] Similarly, land exchanges are allowed "if the exchange is in the public interest and will actively contribute to the public benefits . . . ."[825]

- WASH. REV. CODE §§ 79.130.010 to 79.130.900: Beds of Navigable Waters. The legislative intent of these provisions is the same as in § 79.105.001, relating to aquatic lands.[826] Leases of these beds are allowed.[827]
- WASH. REV. CODE §§ 90.03.005 to 90.03.611: Water Code. "It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights."[828] "Subject to existing rights all waters within the state belong to the public . . . ."[829] The Water Code requires minimum flows and levels to be protected.[830]
- WASH. REV. CODE §§ 90.14.010 to 90.14.910: Registration, Waiver, and Relinquishment.
- WASH. REV. CODE §§ 90.16.010 to 90.16.120: Appropriation of Water for Public and Industrial Purposes.
- WASH. REV. CODE §§ 90.20.010 to 90.20.110: Appropriation Procedure.
- WASH. REV. CODE §§ 90.22.010 to 90.22.060: Minimum Water Flows and Levels.
- WASH. REV. CODE §§ 90.40.010 to 90.40.100: Water Rights of United States.
- WASH. REV. CODE §§ 90.42.005 to 90.42.900: Water Resource Management. The legislature found that Washington was facing a

822. *Id.* § 79.105.210(1).
823. *Id.* § 79.105.210(3).
824. *See id.* §§ 79.105.100–79.105.160.
825. *Id.* § 79.105.400.
826. *Id.* § 79.130.001.
827. *Id.* § 79.130.010.
828. *Id.* § 90.03.005.
829. *Id.* § 90.03.010.
830. *Id.* § 90.03.247.

water shortage.[831] These provisions establish a trust water rights program[832] and water banking.[833]

- WASH. REV. CODE §§ 90.44.010 to 90.44.520: Regulation of Public Ground Waters.

Definition of "Navigable Waters":

Washington recognizes both the "ebb and flow" tidal test and the navigable-in-fact test for title navigability.[834] Thus, a slough was considered navigable when it was navigable during the ebbing and flowing of the tide

> and has been and can be used as a public highway for boats, scows, and other ordinary modes of water transportation for general commercial purposes, and especially for rafting, booming, and floating and towing of logs up and down the same; that said slough has been so used for at least twenty years.[835]

Washington has used a log floatation test, in combination with the declaration in Article XVII § 1, of the Washington Constitution, to find the Cowlitz River navigable for purposes of state ownership and control.[836] Similarly, Lake Union was declared navigable because it is capable of being navigated.[837] However, "a stream which can only be made navigable or floatable by artificial means is not a public highway."[838] Moreover, the Washington Supreme Court has also applied the federal commerce test of navigability.[839]

The U.S. Supreme Court has declared that the Columbia River is a navigable river under the federal test.[840] As a result, Washington, not the United States, owns the beds and banks of that river on the Washington side of the Oregon-Washington border.[841]

831. *Id.* § 90.42.005(2)(a).
832. *See id.* §§ 90.42.030–90.42.040.
833. *Id.* § 90.42.100.
834. WASH. CONST., art. XVII, § 1; Brace & Hergert Mill Co. v. Washington, 95 P. 278, 280 (Wash. 1908); City of New Whatcom v. Fairhaven Land Co., 64 P. 735, 737–38 (Wash. 1901).
835. Dawson v. McMillan, 75 P. 807, 808–09 (Wash. 1904).
836. Robinson v. Silver Lake Railway & Lumber Co., 279 P. 1109, 1113–14 (Wash. 1929).
837. *Brace & Hergert Mill Co.*, 95 P. at 281.
838. East Hoquiam Boom & Logging Co. v. Neeson, 54 P. 1001, 1002 (Wash. 1898) (citing The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870)).
839. Lefevre v. Wash. Monument & Cut Stone Co., 81 P.2d 819, 822 (Wash. 1938) (citing Oklahoma v. Texas, 258 U.S. 574 (1922); Snively v. Washington, 9 P.2d 773, 774 (Wash. 1932); Smith v. Washington, 50 P.2d 32, 32–33 (Wash. 1935); Proctor v. Sim, 236 P. 114, 116 (Wash. 1925)).
840. Silas Mason Co. v. Tax Comm'n of State of Wash., 302 U.S. 186, 197–99 (1937).
841. *Id.* at 198.

Rights in "Navigable Waters":

In Washington, the ordinary high water mark is the boundary between state and private ownership in navigable waters.[842] However, "the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands."[843]

Before Washington changed its policies in 1971 to limit sales and leases of aquatic lands, "the state had sold approximately 60 percent of its tidelands and 30 percent of its shorelands."[844] Despite the state's power to engage in such sales and leases, however, "[t]he Legislature has never had the authority . . . to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands."[845] The state cannot convey this jus publicum,

> and the state holds such dominion in trust for the public. It is this principle which is referred to as the 'public trust doctrine.' Although not always clearly labeled or articulated as such, our review of Washington law establishes that the doctrine has always existed in the State of Washington.[846]

Moreover, in general, in every grant of submerged lands "there was an implied reservation of the public right."[847]

Washington's Shoreline Management Act of 1971[848] fully meets the requirements of the public trust doctrine.[849] As such, public recreational docks permitted under the Act do not violate the doctrine.[850] Similarly, a county ordinance banning personal watercraft in navigable waters did not violate the public trust doctrine, because the doctrine is flexible, the "county had not given up its right of control over its waters," and "the Ordinance is consistent with the goals of statewide environmental protection statutes"; plus, "it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state."[851]

842. *Brace & Hergert Mill Co.*, 95 P. at 280.

843. Wilbour v. Gallagher, 462 P.2d 232, 238 (Wash. 1969). *See generally* Lorraine Bodi, *The Public Trust Doctrine in the State of Washington: Does It Make Any Difference to the Public?*, 19 ENVTL. L. 645 (1989).

844. Caminiti v. Boyle, 732 P.2d 989, 992 (Wash. 1987).

845. *Id.*

846. *Id.* at 994 (citations omitted).

847. City of New Whatcom v. Fairhaven Land Co., 64 P. 735, 737 (Wash. 1901); *see also* Lake Union Drydock Co., Inc. v. Wash. Dep't of Natural Res., 179 P.3d 844, 851 (Wash. App. 2008) (holding that the Department cannot lease shorelands for $1.93 per acre (which is considered "virtually rent-free") because, under the public trust doctrine, the state cannot give away the jus publicum).

848. WASH. REV. CODE § 90.58 (2009).

849. *Caminiti*, 732 P.2d at 995.

850. *Id.* at 997.

851. Weden v. San Juan County, 958 P.2d 273, 283–84 (Wash. 1998). *But see* Biggers v. City of Brainbridge Island, 169 P.3d 14, 22 (Wash. 2007) (en banc) (holding that the Washington Constitution and the public trust doctrine limit local government authority to regulate the shoreline use, and police powers are limited there). *See generally* Ralph W. Johnson, *The Public Trust Doctrine and Coastal Zone*

Because the public trust doctrine existed in Washington prior to the Shoreline Management Act of 1971, there could be no regulatory takings claims based on that statute's limitations on shoreland property's use.[852] "The public trust doctrine resembles a 'covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.'"[853] As a result, owners along shorelands "never had the right to dredge or fill [their] tidelands, either for a residential community or farmlands."[854]

In navigable waters, the public has rights of navigation, fishing, boating, swimming, water skiing, and other related recreation.[855] Such other rights probably include boating, bathing, fishing, fowling, skating, cutting ice, water skiing, and skin diving.[856] However, "in Washington, the public trust doctrine does not encompass the right to gather clams on private property," because shellfish rights follow title to the submerged lands.[857]

Nevertheless, Washington's public trust doctrine is limited to surface navigable waters, and the Washington Supreme Court has refused to apply it to either ground waters or non-navigable waters.[858] Moreover, absent specific statutory authorization, state agencies cannot "assume the State's public trust duties and regulate in order to protect the public trust."[859] As a result, the public trust doctrine does not apply to the Department of Ecology's implementation of state water law.[860]

In contrast, Washington has flirted with applying some version of a public trust doctrine to wildlife, especially shellfish. For example, the Washington Court of Appeals has stated that the public trust doctrine applies to the Department of Natural Resources' regulation of shellfish such as geoducks.[861]

Management in Washington State, 67 WASH. L. REV. 521 (1992) (discussing the relationship of the doctrine to police power and coastal planning).

852. Orion Corp. v. Washington, 747 P.2d 1062, 1072–73 (Wash. 1987).

853. *Id.* (quoting Scott Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 ENVTL. L. & LITIG. 107, 118 (1986)).

854. *Id.* at 1073.

855. *Caminiti*, 732 P.2d at 994 (citing Wilbour v. Gallagher, 462 P.2d 232, 239 (Wash. 1969)).

856. *Wilbour*, 462 P.2d at 239 n.7. *See generally* Davison, *supra* note 146 (arguing that Washington's public trust doctrine is already broader in the rights it protects).

857. Washington v. Longshore, 982 P.2d 1191, 1195–96 (Wash. App. 1999), *aff'd*, 5 P.3d 1256, 1259–63 (Wash. 2000) (en banc); *see also* Wash. State Geoduck Harvest Ass'n v. Washington State Dep't of Natural Res., 101 P.3d 891, 895 (Wash. App. 2004) (noting that shellfish are not typical wildlife in Washington because they are considered part of the land).

858. *See* Rettowski v. Dep't of Ecology, 858 P.2d 232, 239 (Wash. 1993) (en banc).

859. *Id.*

860. *Id.* at 239–40; *see also* R.D. Merrill Co. v. Wash. Pollution Control Hearings Bd., 969 P.2d 458, 467 (Wash. 1999) (holding that, in the water rights context, the public trust doctrine is not an independent source of regulatory authority for the Department of Ecology); Postema v. Wash. Pollution Control Hearings Bd., 11 P.3d 726, 744 (Wash. 2000) (en banc) (same).

861. *Wash. State Geoduck Harvest Ass'n*, 101 P.3d at 895. *But see* Citizens for Responsible Wildlife Mgmt. v. Washington, 103 P.3d 203, 205 (Wash. App. 2004) ("No Washington case has applied the public trust doctrine to terrestrial wildlife or resources. But we need not decide whether the

Nevertheless, the Department's regulation of the commercial geoduck harvest pursuant to the wildlife statutes did not violate the public trust doctrine despite the public right to fish, because the state must "balance the protection of the public's right to use resources on public land with the protection of the resources that enable these activities," the Department had not given up its control over the state's geoduck resources, and the regulation facilitated sustainable geoduck harvesting and natural regeneration of the resource, serving the public interest.[862] Because the state owns the beds of navigable waters and because, under Washington case law, shellfish are considered part of the beds, the Department "has a continuing obligation under the public trust doctrine to manage the use of the resources on the land for the public interest. And [case law] is consistent with the conclusion that shellfish embedded on public property are resources that invoke a public right under the public trust doctrine."[863]

WYOMING

Date of Statehood: 1890

Water Law System: Prior appropriation[864]

Wyoming Constitution: Wyoming has constitutionalized public rights in water through the constitutional declaration that waters belong to the state. Several other constitutional provisions are also relevant:

- Art. I, § 31: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved."
- Art. 8, § 1: Irrigation and Water Rights. "The water of all natural streams, springs, lakes or other collections of still water, within the

public trust doctrine applies [to prohibitions on terrestrial hunting and trapping] because, even if it does, Citizens' challenge fails." (emphasis added)).

862. *Wash. State Geoduck Harvest Ass'n*, 101 P.3d at 895–97 (examining WASH REV. CODE § 79.135.210 (2005)).

863. *Id.* at 896; *see also* Nelson Alaska Seafoods, Inc. v. Washington, 177 P.3d 1161, 1164 (Wash. App. 2008) (upholding a tax on geoduck harvests on the first commercial owner and noting that the Department of Natural Resources merely regulated the harvest in accordance with the public trust doctrine). For a discussion of whether Washington's public trust doctrine could apply to other environmental issues, see Ralph W. Johnson, *Oil and the Public Trust Doctrine in Washington*, 14 U. PUGET SOUND L. REV. 671, 671–73, 688–707 (1991) (discussing the application of the doctrine to oil spills).

864. *See* Farm Inv. Co. v. Carpenter, 61 P. 258, 259 (Wyo. 1900) (noting that prior appropriation legislation had been in place since 1875 and holding that "[i]n this state the doctrine prevails that a right to the use of water may be acquired by priority of appropriation for beneficial purpose, in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands").

boundaries of the state, are hereby declared to be the property of the state."

- Art. 8, § 2: "There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervisions of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions shall be subject to review by the courts of the state."
- Art. 8, § 3: "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interest."
- Art. 8, § 4: "The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof."
- Art. 8, § 5: This provision establishes the office of the state engineer.
- Art. 13, § 5: Municipal corporations have authority to acquire water rights.
- Art. 16, § 10: This provision governs the construction and improvement of works for the conservation and utilization of water.

Wyoming Statutes:

- WYO. STAT. ANN. § 1-37-106: Adjudication of Water Rights.
- WYO. STAT. ANN. § 35-10-401: This provision prohibits obstruction of a "public river or stream, declared navigable by law," or pollution of waters.
- WYO. STAT. ANN. Title 41, Chapter 3: Water Rights. This provision establishes preferences for domestic and transportation purposes, steam power plants, and industrial purposes.[865] "The legislature finds, recognizes and declares that the transfer of water outside the boundaries of the state may have a significant impact on the water and other resources of the state. Further, this impact may differ substantially from that caused by uses of the water within the state. Therefore, all water being the property of the state and part of the natural resources of the state, it shall be controlled and managed by the state for the purposes of protecting, conserving and preserving to the state the maximum permanent beneficial use of the state's waters."[866] These statutes encompass reservoirs (Article 3);

865. WYO. STAT. ANN. § 41-3-102 (2009).
866. *Id.* § 41-3-115(a).

abandonment of water rights (Article 4); water divisions and superintendents (Article 5); water districts and commissioners (Article 6); water conservancy districts (Article 7); flood control districts (Article 8); underground water (Article 9); and instream flows (Article 10).

- WYO. STAT. ANN. § 41-12-301: Colorado River Compact.

Definition of "Navigable Waters":

The Wyoming Supreme Court acknowledges the variety of definitions of "navigable waters," including the federal commerce definition, which it uses as the title definition of navigability. The court noted:

> We understand that "navigability in the Federal sense" means the capability or susceptibility of waters, in their natural condition, of being used for navigation in interstate or international commerce, and navigability in any other sense may mean any one of a variety of definitions given navigability by either of the several states of the Union.[867]

Historical statutes in Wyoming reference transportation and log floatation.[868]

Regarding public use rights in Wyoming, "the actual usability of the waters is alone the limit of the public's right to employ them."[869] Except in federally navigable waters, "the exclusive control of waters is vested in the state," and hence "[i]t follows that the state may lay down and follow such criteria for cataloguing waters as navigable or nonnavigable, as it sees fit, and the state may also decide the ownership of submerged lands, irrespective of the navigable or nonnavigable character of the waters above them."[870] As a result, because the Wyoming Constitution gives the waters to the state, fine distinctions of navigability are unimportant.[871] "The test of navigability does not determine other uses to which the state may put its waters even though navigability would determine the title to the land underlying them."[872]

Rights in "Navigable Waters":

"[I]f a river is nonnavigable the bed and channel of the stream belong to the riparian owner."[873]

Nevertheless, in Wyoming, the public has rights in the waters themselves, irrespective of bed ownership. According to the Wyoming Supreme Court:

867. Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961).
868. *Id.*
869. *Id.*
870. *Id.*
871. *Id.* at 144.
872. *Id.*
873. *Id.* at 145.

> At the modern common law, public waters are generally confined to those which are navigable; and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts—a public use sufficient to support the exercise of eminent domain.[874]

Thus, Wyoming waters are public, and the constitutional declaration of state ownership is valid.[875]

More expansively, "the Legislature was aware that, without regard to their being navigable or nonnavigable in the Federal sense or any other concept of navigability, [the state's] waters are usable for purposes other than irrigation, consumption, power or mining and that the waters might be used for transportation by floatation."[876] As a result, the public has a right to float in the North Platte River, which was also recognized in the 1959 State Laws of Wyoming.[877]

State ownership of the waters themselves impresses those waters with a public trust.[878] The public can float craft down any waters so usable, regardless of bed ownership, and can scrape bottom, disembark, and pull the craft over shoals.[879] Moreover, members of the public can hunt or fish while floating.[880] However, public use rights do not give the public the right to wade or walk on privately owned streambeds.[881]

874. Farm Inv. Co. v, Carpenter, 61 P. 258, 264 (Wyo. 1900).
875. *Id.* at 264–65.
876. *Day*, 362 P.2d at 143.
877. *Id.* at 139.
878. *Id.* at 145.
879. *Id.* at 145–46.
880. *Id.* at 147.
881. *Id.* at 146.

2011 WL 5126226 (U.S.) (Appellate Brief)
Supreme Court of the United States.

PPL MONTANA, LLC, Petitioner,
v.
STATE OF MONTANA, Respondent.

No. 10-218.
October 27, 2011.

On Writ of Certiorari to the Supreme Court of the State of Montana

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*i QUESTION PRESENTED

This Court granted certiorari (131 S. Ct. 3019 (2011) (Mem.)) to decide the first question presented by the petition for a writ of certiorari (Pet. i-ii), which asks:

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

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*1 INTRODUCTION

Under the constitutionally grounded equal footing doctrine, all States enter the Union with title to the lands underlying the navigable waters within their borders and "the right to control and regulate navigable streams" on that land. *Coyle v. Smith,* 221 U.S. 559, 573 (1911). This case concerns the State of Montana's title to lands underlying three rivers - the Missouri, Clark Fork, and Madison. Those rivers not only are home to some of the most prized trout fishing in the world, but have served as public highways of commerce since long before frontier times. The importance of the Missouri runs even deeper. The Missouri has long been regarded as one of America's great rivers and is the object of one of the nation's most important explorations - the Lewis and Clark Expedition. From territorial times to this day, the Great Falls of the Missouri have appeared on the official seal of Montana. In a real sense, the question in this case is whether the Great Falls belong to the people of Montana in public trust, or instead to the federal government or petitioner PPL Montana (PPL).

After carefully considering this Court's navigability precedents dating back nearly two centuries, the Montana state courts reached a judgment that would surprise few Montanans: The rivers at issue are navigable, and Montana therefore took title to the riverbeds at statehood, in public trust for Montanans. Indeed, PPL itself *admitted* at the outset of this litigation that the rivers at issue were navigable. *Infra* at 15. PPL now asks this Court to overturn that judgment. PPL's position is grounded on a novel interpretation of this Court's decisions and a selective account of history. If adopted, PPL's position would *2 upset centuries-old expectations and call into question the navigability of rivers not just in Montana but throughout the United States. That is particularly true for the American West, where rivers remain important highways of commerce, provide vital habitats for fish and wildlife, are generally open to the public for recreational pursuits such as fishing, and have a near-mystical quality in parts like Montana. *Cf. New York v. New Jersey,* 283 U.S. 336, 342 (1931) ("A river is more than an amenity; it is a treasure.") (Holmes, J.).

The "constitutional test" for navigability (Pet. i) articulated by the Montana Supreme Court is grounded on this Court's precedents going back to *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1871). PPL itself acknowledges that, under "long-settled law," the touchstone of navigability-for-title is whether the river was used, or was susceptible for use, as a highway of commerce at statehood. PPL Br. 27 (citing *The Daniel Ball,* 77 U.S. at 563). As to the Missouri and Clark Fork, PPL argues that this test cannot be met, because the Great Falls (Missouri) and Thompson Falls (Clark Fork) themselves were impassable by boat. But, as the Montana Supreme Court recognized (Pet. App. 54-55), this Court long ago held that natural interruptions do not defeat navigability where the obstacles were portaged so that the river continued to serve as a channel of commerce. Indeed,

since at least the Northwest Ordinance of 1787, such "carrying places" have been recognized as facilitating - not defeating - the highways of commerce along America's navigable rivers. Here, it is undeniable that the falls in question were portaged so that the rivers served as continuous highways of commerce before statehood.

*3 As to the Madison, PPL's primary argument is that the Montana Supreme Court erred in considering *post*-statehood use in determining whether the navigability test was met. All agree that, compared to the Missouri and Clark Fork, there is relatively little evidence of the pre-statehood use of the Madison. In that respect, the Madison presents a tougher historical case. But *The Daniel Ball* itself holds that navigability may be based on *susceptibility* for use as a highway of commerce. 77 U.S. at 563. And this Court's precedents support the commonsense conclusion that - while the navigability-for-title test looks to navigability at the time of statehood - post-statehood evidence of navigability is relevant, and thus admissible, insofar as it helps to establish susceptibility of navigation *at statehood.* That is the only basis for which the Montana Supreme Court relied upon evidence of post-statehood use. Pet. App. 56. And this Court's precedents also repudiate PPL's other argument concerning the Madison that log floats and commercial drift boat fishing on the river are not relevant in gauging navigability as of statehood.

PPL goes to extraordinary lengths to attack the Montana Supreme Court's decision. It calls into question the good faith and intentions of the Montana courts, PPL Br. 25, 30, 33, and decries the Montana Supreme Court's decision as a "judicial taking[]," *id.* at 25. But the only potential "taking" in this case is the one that PPL is attempting to accomplish by asking this Court to substantially narrow the centuries-old concept of navigability and thereby deprive Montana - and the people of Montana - of their long-held title to the riverbeds at issue. That effort should be rejected.

*4 STATEMENT OF THE CASE

More than two centuries ago, Captain Meriwether Lewis stood on the banks of the Missouri in the territory that would become Montana. Taken by the sight before him, Lewis observed that he did not believe "that the world can furnish an example of a river running to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are." JA 162. Within a few years of Lewis and Clark, fur traders established trade routes along Montana's rivers, to both the East and West. Decades later, with the advent of the gold and copper rushes, Montana's population surged and the territory's fledgling economy began to take off. But transportation remained a challenge. The railroad did not reach Montana until the late 19th century, and at the time Montana joined the Union in 1889, the railroad was still in its infancy. *See id.* at 112-13, 215, 236. Cutting through Montana's vast expanse, Montana's network of navigable waterways fueled exploration and the territory's economic growth. That was particularly true for the Missouri - one of America's signature waterways - which, among other things, was used to transport gold mined from the Helena area back East. Ultimately, the history of the Missouri and other rivers at issue in this case well illustrates the indispensable role that navigable waters played in the exploration, economy, and everyday life of early America.

A. Montana's Entry Into The Union

The State of Montana - like all States - holds title to the lands beneath all navigable waters within its borders for the benefit of its citizens. The sovereign's responsibility to hold such lands in trust for its *5 citizenry can be traced as far back as Justinian in ancient Rome. *See Institutes of Justinian*, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841) ("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common."). Under English common law dating back to the time of the Magna Carta, the Crown held title to all lands underlying navigable waters "for the benefit of the whole people." *Utah Div. of State Lands v. United States,* 482 U.S. 193, 196 (1987) (citing *Shively v. Bowlby,* 152 U.S. 1, 11-14 (1894)); *see* Michael Evans & R. Ian Jack, *Sources of English Legal and Constitutional History* 53 (1984).

When the original thirteen Colonies formed the Union, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. *Shively,* 152 U.S. at 15-16. "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively."

Pollard v. Hagan, 44 U.S. (3 How.) 212, 230 (1845). Because the "right to the rivers passes with a transfer of sovereignty, *id.* at 216, new States entered the Union "on an equal footing with the original 13 Colonies and succeed ed to the United States' title to the beds of navigable waters within their boundaries," *United States v. Alaska,* 521 U.S. 1, 5 (1997). Montana entered the Union on the same footing in 1889 when it became the 41st State.

From the time of Montana's statehood, it has been generally recognized that the riverbeds at issue belong to the people of Montana in public trust, and not private riparian owners. At or around the time of statehood, the General Land Office (the predecessor agency to the Bureau of Land Management within the *6 Department of the Interior), "meandered" most of the riverbanks along the rivers at issue to ensure that any later conveyances to private parties ended at the high-water mark - and thus did not purport to convey title to the lands underlying navigable waters. *See* Trial Exh. S-48 at 13 (Jenkins Report). The maps created by the Surveyors General of the United States plainly show that the federal surveyors "returned as navigable" the rivers at issue and therefore excluded the riverbeds from private conveyances. *See, e.g.,* Exhs. S-40, S-41, S-42, S-42B (Thompson Falls); Exh. S-33 (Madison); *see also* Exh. S-44 (Missouri River Commission map). Although such meandering does not conclusively establish navigability, it is precisely the sort of thing on which "settled expectations" are formed "where land titles are concerned." *Leo Sheep Co. v. United States,* 440 U.S. 668, 687 (1979). [1]

1 Under instructions issued by the Commissioner of the General Land Office in 1881, navigable rivers were to be meandered by federal surveyors on *both* banks, thereby clearly delineating riparian property boundaries, while rivers considered non-navigable were to be meandered on only one bank. *See* U.S. Gen. Land Office, *Instructions of the Commissioner of the General Land Office to the Surveyors General of the United States Relative to the Survey of the Public Lands and Private Land Claims* 33-35 (May 3, 1881). Montana law has long recognized such meandering in determining title to riverbeds. *See*Mont. Code Ann. § 85-1-112.

Likewise, consistent with the understanding that the State owns the riverbeds, the State has long managed the rivers and attendant riverbeds under actual and apparent authority of title. Thus, for example, Montana's Board of Land Commissioners, which manages school trust land across Montana, has *7 issued (at least) 97 easements on the Missouri, Clark Fork, and Madison, an additional 85 mineral leases on the Missouri, and eight annual licenses and other leases on the Clark Fork and the Missouri to such private parties. [2] Likewise, in practice, private parties seeking to construct a power line, pipeline, riprap, kayak run, access bridge, or other commercial fixture along the rivers at issue in this case generally have sought permission from the State before doing so.

2 Montana Trust Land Management System (TMLA NET) Query, Sept. 27, 2011 (record and ownership repository), http:// dnrc.mt.gov/ trust/default.asp; *see* Resp. Mont. S. Ct. Br. 13-15 (discussing State's management of trust lands).

Not long after statehood, the Montana Supreme Court recognized the navigability of both the Missouri and Clark Fork, describing the latter as " a matter of common knowledge. " Opp. App. 31 (citation omitted), 35. To the State's knowledge, until this litigation, no private riparian owner has ever claimed title to the riverbeds at issue as against the State. And, as the Montana trial court found (consistent with the way in which the federal government meandered the rivers at issue long ago), the deeds held by PPL and other private owners show on their face that any private ownership interests end at the riverbank. Opp. App. 59; *see id.* at 37-38; Resp. Mt. S. Ct. Br. 28-29. Nor has the United States ever asserted ownership of the riverbeds at issue - an assertion that would be undermined by the way the federal government's own surveyors meandered the rivers at statehood. [3]

3 In a footnote that refers to *flood* lands, the United States (at 3 n.3) appears to suggest that PPL pays rent to the federal government for some portion of the riverbeds at issue. That is incorrect. PPL advanced this argument for the first time in its Supplemental Brief in Support of Certiorari (at 2), citing only a letter that PPL itself submitted to FERC just ten days before that Supplemental Brief was filed (*id.* at App. 4-9). In any event, the State's claim for compensation meticulously excluded federally-owned flooded uplands (*see* Ex. S-48 at 22; Sept. 4, 2007 Order 20-29 (Dkt. 253)), and was based solely on riverbeds to which the United States has never claimed title.

***8 B. The Rivers At Issue**

The Missouri, Clark Fork, and Madison Rivers span hundreds of miles of the northwest, central, and southern parts of the State. *See* Add. 1a (map). While each has its own unique history and geography, the rivers - and especially the Missouri - are among the crown jewels of Montana's system of waterways.

Missouri River. The Missouri is the longest river in North America (spanning some 2400 miles) and before the railroads took root provided one of the most important thoroughfares to the West for settlers and pioneers. *See, e.g.*, Francis Parkman, *The Oregon Trail, Sketches of Prairie and Rocky-Mountain Life* (1883); JA 311. It has been cited frequently in court opinions, legislative debates, and historic works as the exemplar of a navigable river.[4] The Missouri has its headwaters at Three Forks, Montana - the junction of the Gallatin, Madison, and Jefferson Rivers - and flows northward through Helena, Great Falls, and Fort Benton, Montana, before turning east and entering ***9** North Dakota. After passing through six more States, it eventually flows into the Mississippi River.

4 *See, e.g., Hardin v. Jordan,* 140 U.S. 371, 382 (1891); *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 698 (1899); *Kansas v. Colorado,* 206 U.S. 46, 94 (1907); 59 Cong. Rec. 7730 (1920).

In 1803, aware of the Missouri's reputation as one of the continent's great waterways, President Jefferson commissioned an expedition whose "object" was "to explore the Missouri River, and such principal streams of it ... [that] may offer the most direct and practicable water-communication across the continent." JA 304-05. Lewis and Clark left St. Charles, Missouri, on May 14, 1804, heading up the Missouri for what would become one of America's greatest explorations. They arrived in what today is Montana approximately one year later, having ascended the river in pirogues and bateaux.

On June 13, 1805, Lewis set out ahead of the group to scout the upcoming route. By midday, he had come upon a series of five waterfalls, the largest of which - known as Great Falls - Lewis called "the grandest site I ever beheld." 4 *The Journals of the Lewis & Clark Expedition,* 284 (Gary E. Moulton ed., Univ. of Neb. Press 1987). Within a day, Lewis managed to chart out a roughly 17-mile portage around the falls - a distance that must be viewed in light of the 20 or more miles that Lewis and his team regularly traveled in a day during the course of the expedition. The portage began on June 22. JA 405. Although the land was unfamiliar, the load heavy (JA 407-08), and some members of the party - including Sacagawea - ill (JA 412), the expedition arrived at upper portage camp, just south of the present day city of Great Falls, on July 2 - 11 days later. App. 2a (map); JA 421. On July 15, the party put ***10** their boats back into water to proceed up the Missouri to its very mouth at Three Forks. JA 433-34.[5]

5 PPL describes (at 8, 40-41) the portage as taking 33 days. That covers the period from when Lewis first discovered the Great Falls to when the expedition put boats back into water above the falls. The expedition "set out to pass the portage" nine days after Lewis discovered the falls. JA 405. It took the expedition 11 days to travel the 17 miles from the lower to upper portage camps. And the expedition spent the remaining 13 days at upper portage camp preparing to continue the journey upriver. *See* JA 401-434.

The Great Falls consists of five different falls along almost eight river miles from the first cascade to the last, with various rapids and calmer waters mixed in between. The largest cascade - Great Falls - is the first in the series moving upriver from Fort Benton. Crooked Falls lies about 4.3 miles upriver from that. Beautiful Falls (or Rainbow Falls) lies about a half mile up river. Colter Falls, which is now fully submerged, lies about one mile upriver. And Black Eagle Falls, the last of the cascades, lies about two miles upriver. *See* JA 687; Add. 2a (map). The 17 miles that has been used in this case to refer to the Great Falls is generally demarked by the confluence with Belt (Portage) Creek, several miles below Great Falls, and Sun (Medicine) River, several miles above Black Eagle Falls. JA 296; Add. 2a. It is undisputed that the falls themselves were not passable by boat at statehood.

Although Lewis and Clark's portage of the Great Falls is certainly the most historic, it was by no means the last. In particular, during the 1860s, amidst the Montana gold rush, large numbers of miners regularly portaged the Great Falls as they traveled the Missouri between Fort Benton and Three Forks. JA 313. A line ***11** of mackinaw boats regularly carried passengers from north of Helena to Fort Benton, making a short portage around the Great Falls, and arriving at Fort Benton in just three days total. From there, passengers embarked onto steamboats and headed East down the Missouri as far as St. Louis. *See* JA 312-13 (citing Hubert Howe Bancroft, *History of Washington, Idaho, and Montana* 732 n.9 (1890)); Add. 3a-6a, 9a-16a (excerpts of federal government briefs in *Montana Power Co. v. Federal Power Comm'n*). [6]

6 Although the United States attempts the distinguish *Montana Power Company* on legal grounds (U.S. Br. 26), the Solicitor General's factual description of the "actual use" of the same stretch of the Missouri at issue here is in no way tied to any particular legal argument concerning navigability. Add. 3a-7a.

The 260-mile stretch of the Missouri between Three Forks and Fort Benton - encompassing the seven dams that PPL today owns along the Missouri - served as a vital highway of commerce at and before statehood. There is historical evidence that the stretch was used by fur traders and miners to transport their goods, as well as evidence of the use of steamboats above and below the falls, and of log rafting. *See, e.g.*, JA 112, 169, 175-77, 181, 189, 307-08. As the evidence shows - and the Solicitor General of the United States has previously explained in detail to this Court - the Great Falls by no means marked the end of, or impeded, this highway of commerce. Rather, a relatively short portage around the falls allowed commerce to continue along this stretch of the river as part of a continuous highway of commerce. That highway was well-known, and well-traveled, before the railroads arrived in Montana. *See* JA 313 & n.24; Add. 4a-5a, 13a-15a.

***12** *Clark Fork River.* The Clark Fork rises in the Silver Bow Mountains near Butte, Montana. From there, it flows northwest through Missoula where it intersects with the Blackfoot, continues through Thompson Falls, and eventually crosses into Idaho, where it empties into Lake Pend Oreille. The Clark Fork provided a remarkably uniform channel at statehood with few interruptions. The only significant obstruction was the Thompson Falls - which today is the site of one of PPL's dams. The falls occupied less than half a mile and caused a drop in elevation of four to six feet. Including its surrounding rapids, the falls span approximately 2.8 miles. Despite that obstacle, the Clark Fork was regularly navigated by traders and explorers along this stretch, and was used for numerous log drives, before statehood.

Shortly after Lewis and Clark passed through Montana on their way back East, David Thompson - a fur trader and explorer - canoed down the Clark Fork from the Flathead river all the way to Lake Pend Oreille, "portaging at Thompson Falls and Rock Island Rapids." JA 66, 234. Others similarly navigated the Clark Fork from Missoula (above Thompson Falls) down to Lake Pend Oreille. JA 101. During the early fur-trading era, the Kootenai "often traded on the Clark Fork" (referring to the stretch between the lower Flathead and Lake Pend Oreille, encompassing Thompson Falls). JA 105. Many decades later, during the 1860s and 1870s, local newspapers reported boat service along the Clark Fork from points above Thompson Falls to Lake Pend Oreille. JA 118, 131.

This stretch of the Clark Fork also served as a significant channel for log drives. Multiple reports of log floats on the Clark Fork appear in the 1880s, in ***13** tandem with the need to move building materials for construction of the railroads. JA 213. Log drives originated on Ninemile Creek and the Flathead River - both above Thompson Falls - and the logs were driven down the Clark Fork all the way to Idaho. JA 240-41. In 1882, the *Missoulian* announced that logs "can be floated right to the locality down the Missoula and Pen d'Oreille rivers." JA 143. There are numerous additional accounts of log floating and small boat use from Lake Pend Oreille to places above Thompson Falls around the time of statehood and shortly thereafter. *See* JA 126, 129, 223, 234, 356-57.

Steamboat navigation brought heavier traffic to the Clark Fork below Thompson Falls. In the 1860s, during the Montana gold rush, several companies operated steamboats that took miners and others from Lake Pend Oreille to points near Thompson Falls and back, providing for "a complete and reliable line of steamers for a distance of 125 miles, from Pen d'Oreille [sic] landing to Thompson's river." JA 119; *see* JA 113, 116, 119-21, 125, 138-39, 141.

Madison River. The Madison River rises in Yellowstone National Park in Wyoming and flows northward into Montana for 140 miles before joining the Gallatin and Jefferson Rivers at Three Forks to form the Missouri River. When William Clark reached the Three Forks on July 25, 1805, he observed that the Jefferson, Madison, and Gallatin Rivers were "nearly of a Size" (*i.e.*, shared the same characteristics). JA 252. This comparison is significant because Lewis had previously described the Jefferson as an exemplar of a navigable river in "a mountainous country." JA 162. While it has been reported that the Madison was used by trappers and explorers in the 1800s (JA 218, 251), ***14** the evidence of pre-statehood commerce along the river was sparse compared to that of the Missouri and the Clark Fork. The lack of additional historic use no doubt stems in part from the fact that low-land Indian Tribes, such as the Blackfeet, lacked permanent settlements and were notoriously hostile to outsiders - as Lewis himself learned the hard way. JA 189.[7]

7 On July 27, 1806, the Blackfeet attacked Lewis and his party, stealing some of their guns and attempting to escape with their horses. Lewis and other members of the party took chase to recover the stolen property, eventually apprehended the culprits, and recovered their horses. *See* 5 *Original Journals of the Lewis and Clark Expedition* (R. G. Thwaites ed., 1904) 219-28.

The Madison's natural condition between April and July was viewed as ideal for log-driving - this being "the first river in the country that had not a dollar of expenditure before the drive was started." JA 155. Shortly after Montana's entry into the Union, however, several dams were built along the Madison - including the Hebgen and Madison dams owned by PPL - making log floats more difficult by *lowering* water levels during what were previously high-flow months and erecting artificial obstructions. JA 258-59. Nevertheless, not long after statehood, the Madison River Lumber Company floated logs down most of the middle portion of the Madison, despite the relatively lower July waters. JA 155.

The Madison is best known today for its prized fishing - something close to "religion" in Montana. Norman MacLean, *A River Runs Through It and Other Stories* 1 (1976). The river is classified as a "blue ribbon" trout stream and attracts avid fishermen from all around the world. JA 261. Commercial fishing drift ***15** boats regularly navigate the Madison near the Ennis and Hebgen dams. JA 261-62; Opp. App. 63. These drift boats are the historical successors to the shallow-draft pirogues and bateaux used by Lewis and Clark and traders in early commerce. *See generally* Richard Fletcher, *Drift Boats and River Dories* 53-63 (Stackpole Books 2007). The Madison is today among the most heavily used rivers in Montana - just behind the Missouri - in angler days. Opp. App. 63.

C. This Litigation

1. In 2003, parents of Montana school children filed suit in federal district court in Montana against PPL and other privately owned utilities on behalf of Montana's public school children, seeking compensation for defendants' use of state-owned riverbeds at various hydroelectric generation facilities. The suit alleged that the riverbeds occupied by the dams comprised state-owned trust lands for which Montana was obliged under the state constitution to seek compensation in the form of rent for their use. The State intervened in the action and filed its own complaint seeking compensation from defendants for use of the riverbeds. The district court dismissed the action for lack of diversity jurisdiction. Pet. App. 3-5.

2. Before the federal action was dismissed, PPL and other hydroelectric utilities filed a declaratory judgment action against the State in Montana state court, seeking a declaration that Montanans are *not* entitled to compensation for the use of the riverbeds at issue. The State counterclaimed, claiming that it owned the riverbeds at issue and seeking a declaration that it was due compensation for their use. Opp. App. 2-3 (¶¶ 1-2). PPL admitted that its dams were on "navigable river[s]." *E.g.*, Pet. App. 5-8, 17-20; Opp. ***16** App. 17-20 (¶¶ 16, 17-24, 26-27). Instead of contesting navigability, PPL argued that the State's claims for compensation were preempted by the Federal Power Act and the federal navigational servitude because the plants at issue were federally licensed. But after the district court rejected those preemption arguments, PPL did an about-face on navigability.[8]

8 PPL later tried to disavow its admissions and claimed that it had never admitted navigability for *title* purposes. But neither the State's counterclaims nor PPL's answer contained any limitation in describing the rivers as "navigable." Moreover, the State pleaded that "Montana acquired title to the beds and banks of navigable waters in Montana at issue herein." Opp. App. 2 (¶ 3). PPL made similar concessions in its pleadings and briefs in the preceding federal case. *Id.* at 26-31. Courts have long recognized that such admissions ordinarily are binding. *See, e.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *see also Peuse v. Malkuch*, 911 P.2d 1153, 1157 (Mont. 1996). And the Montana district court appropriately found that these admissions were binding on PPL here. Pet. App. 139-43.

The State moved for partial summary judgment on navigability. (PPL did not cross-move.) Both sides submitted affidavits attaching various materials. The State's evidence is summarized at Opp. App. 26-57. PPL's affidavits are reprinted at Pet. App. 190-213. The main point of PPL's lead expert (Emmons) was that the Missouri and Clark Fork were not navigable because it was "impossible" to take a boat down the Great Falls or Thompson Falls *themselves*. *Id.* at 197; *see id.* at 197-201, 203. PPL's other expert (Schumm) focused on the Madison. *Id.* at 205-15. Applying the test for navigability established by *The Daniel Ball*, 77 U.S. at 563 - which holds that rivers are "navigable in fact when they are used, or are susceptible of being ***17** used, in their ordinary condition, as highways for commerce" - the district court granted summary judgment for the State. Pet. App. 135,143.

The court rejected PPL's position - which was the crux of its argument concerning the Missouri - that "the Great Falls clearly prevent navigability" because the *falls themselves* are not susceptible to boat traffic. *Id.* at 138. As the court explained, this Court has long found that natural obstacles "requiring portage" do not defeat navigability when, as the evidence showed here, " 'the natural navigation of the river is such that it affords a channel for useful commerce.' " *Id.* (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874)). The court explained that the same analysis compelled a finding that the Clark Fork was navigable, despite Thompson Falls, given the evidence that the river was used as a "channel of commerce." *Id.* at 142. The court also held that PPL was bound by its admissions that these rivers were navigable. *Id.* at 139, 142.

As for the Madison, the court recognized that, although there is comparatively "little historical documentation" of its use, the available evidence - which includes reports of use " 'by explorers, trappers, miners, farmers, and loggers' " as well as a log float in 1913 - established navigability. *Id.* at 143. The court also observed that "[t]oday, the Madison River experiences considerable recreational use," and found that, "[a]s with the Missouri and Clark Fork," PPL was "bound by its admissions" on navigability. *Id.* [9]

9 The Montana summary-judgment rule requires that a party present any "opposing affidavits" before the "day of hearing." Mont. R. Civ. P. 56(c). Two months *after* the district court's ruling on navigability, PPL purported to make an "offer of proof regarding navigability," comprising hundreds of pages of *additional* reports prepared by its paid experts. JA 38. The district court heard that *proffer* but did not accept these reports as part of the summary judgment record - and could not have under Montana Rule 56(c). PPL thus did not put these documents in the appendix before the Montana Supreme Court or refer to them in that court. PPL nevertheless included the late-filed Emmons report in the appendix to its certiorari petition (at 216312) and continues to rely on both reports in its merits brief. *See, e.g.*, PPL Br. 14, 16, 17, 18. *Cf.* Br. in Opp. 11 n.1.

***18** The district court subsequently held a trial on the outstanding issues in the case and ultimately entered judgment requiring PPL to compensate the people of the State of Montana for its use of their riverbeds.

3. The Montana Supreme Court affirmed the district court's navigability ruling. The Court explained that its "independent review of the case law in this area" confirmed that the district court's "understanding of the navigability for title test was correct," including as to the two "crucial aspects" of the district court's ruling: the significance of portages (bearing on the navigability of the Missouri and Clark Fork) and use of post-statehood evidence (bearing on the navigability of the Madison). *Id.* at 53-54.

Relying on *The Montello*, the court held that portages do not destroy navigability (*id.*) or "require a piecemeal classification" of the river (*id.* at 58). The court explained that this Court had long recognized that most of the nation's rivers " 'originally present[ed] serious obstructions to an uninterrupted navigation,' " but these " 'natural barriers' " did not destroy navigability

where the river still " 'afford[ed] a channel *19 for useful commerce.' " *Id.* at 54a (quoting *The Montello,* 87 U.S. at 442-43). Applying that settled principle, the court held that, "[d]espite the presence of portages along the Clark Fork and Missouri Rivers, the historical evidence establishes that they provided a channel for commerce at the time of statehood, or were susceptible of such use." *Id.* at 56.

As for the post-statehood usage of the Madison, the court explained that, under this Court's decisions in *The Montello* and *United States v. Utah,* 283 U.S. 64 (1931), a river is navigable if "it was 'susceptible' of providing a channel for commerce," even if there is little evidence of " 'actual use' at or before the time of statehood." Pet. App. 54. Applying that principle, the court held that, "[w]hile the historical usage of the Madison was not well-established, the evidence of a log float on its middle portion in the 19th century, combined with its present-day usage, demonstrates that this river was susceptible of providing a channel for commerce at the time of statehood." *Id.* at 56.

The court also carefully considered PPL's more particularized, evidence-specific objections to summary judgment. *See id.* at 56-62. Although PPL has suggested that the Montana Supreme Court gave short shrift to the navigability issue, the court's treatment of that issue was entirely consistent with the space devoted to this issue in the parties' briefs - in a case in which PPL presented several issues on appeal. [10]

10 Because it agreed with the district court's conclusion that the State was entitled to judgment under the navigability-for-title test, the Montana Supreme Court did not need to reach PPL's direct admissions of navigability. Pet. App. 62.

*20 SUMMARY OF ARGUMENT

The judgment reached by the Montana Supreme Court in this case would have seemed natural to Lewis and Clark and the many pioneers who followed in their wake and helped settle the State. PPL's sharp-edged attack on the reasoning and even motives of the Montana Supreme Court is unfounded and out of step with this Court's precedents. The judgment of the Montana Supreme Court should be affirmed.

I. Montana's interest in the riverbeds at issue in this case implicates a matter of core federalism. Under the equal footing doctrine, title to the lands beneath navigable waters is conveyed to the States upon their admission into the Union by the Constitution itself. That conveyance is consistent with the ancient public trust doctrine recognizing that the lands beneath navigable waters are held in public trust for all to use as common highways of commerce - a principle embodied in American law since at least as far back as the Northwest Ordinance of 1787. This Court has the final say over whether riverbeds are part of a navigable waterway, and thus conveyed to the States under the equal footing doctrine. But in reviewing a state court's judgment that rivers are navigable, there is no basis for the Court to adopt the extraordinary "rule of skepticism" proposed by PPL. Instead, the Court should approach navigability issues with the same care and respect it reserves for other matters bearing on an essential attribute of state sovereignty.

II. The Montana Supreme Court properly articulated the "constitutional test" (Pet. i) for navigability in determining whether Montana took title at statehood to the riverbeds at issue. Indeed, the test framed by the Montana Supreme Court is faithfully *21 grounded on this Court's navigability decisions going back to *The Daniel Ball*, which look to whether the river - at the time of statehood - was used, or susceptible of being used, as a public highway for commerce. PPL itself acknowledges (at 27) that *The Daniel Ball* supplies the proper constitutional test. In arguing that the Montana Supreme Court did not abide by that test, PPL really is asking this Court fundamentally to *change* the test. The test that PPL proposes is at odds not only with more than a century of this Court's jurisprudence, but with the concept of navigability - and the role of rivers in American life - that would have been familiar to the Framers at the time the Constitution was adopted.

As to the Missouri and Clark Fork, PPL's overriding complaint is that the Montana Supreme Court did not carve out the Great Falls and Thompson Falls from the surrounding waters and hold that the riverbeds underlying the falls are non-navigable

because the *falls themselves* were not passable by boat. But since as far back as *The Montello*, this Court - relying on *The Daniel Ball* - has held that "obstructions" that preclude "unbroken navigation" do *not* defeat navigability, where the obstructions were portaged so that the rivers continued to serve as public highways of commerce. Here, there is undeniable evidence that the Great Falls and Thompson Falls were portaged so that the rivers continued to serve as public highways for commerce at the time of statehood. For example, in the 1860s, during the Montana gold rush, gold was transported down the Missouri from Helena to Fort Benton - and then back East - with the aid of a portage around the Great Falls. Although the falls prevented "unbroken navigation," they did not ***22** stop the rivers from serving as highways of commerce - and thus they do not defeat navigability.

Relying on *United States v. Utah,* 283 U.S. 64 (1931), PPL argues that courts must carve out any non-"*de minimis*" or "negligible" interruption as its own segment and analyze that segment separately for navigability-for-title purposes. But *Utah* does not support PPL's segmentation rule. Unlike the falls at issue in this case (and the interruptions in *The Montello*), the canyon involved in *Utah* was *not* fully portaged, so the highway of commerce came to a dead end at the canyon. Nor does PPL's segmentation rule have much to commend it. PPL does not define what interruptions are "*de minimis*" or "negligible," and its segmentation approach is a recipe for uncertainty and invites litigation by riparian owners seeking to isolate and break off purportedly "non-navigable" bits and pieces. As *The Montello* teaches, what matters is not whether a particular interruption is one mile, 4.35 miles, or 20 miles, but whether the attendant stretch of the river served as a continuous highway of commerce, notwithstanding the interruption. That test is not only consistent with this Court's precedent, it is consistent with the history and geography of North America.

As to the Madison, PPL takes aim at the Montana Supreme Court's consideration of post-statehood evidence of use as relevant to the river's navigability at statehood. But since at least *The Daniel Ball* it has been settled that navigability may be determined not only on *actual* use as a highway for commerce, but *susceptibility* for use as such. The Montana Supreme Court simply recognized - as this Court itself has - that post-statehood evidence may be "relevant upon the issue of the susceptibility of the rivers" when it ***23** shows that the rivers were used as highways of commerce *at statehood. Utah,* 283 U.S. at 82. Nor is there any merit to PPL's objection about the "*kind* of commerce that counts" (PPL Br. 49 (emphasis added)) in demonstrating navigability. Log floating was one of the classic commercial uses of rivers in the 19th century, and there is no reason to disregard commercial recreational uses - like drift boat fishing - where the boats used by present-day river-goers are comparable to the boats used by those plying and trading on the waters before statehood.

III. Because this Court granted certiorari solely to address whether the Montana Supreme Court articulated the proper "constitutional test" for navigability (Pet. i), there is no reason for the Court to entertain any record-specific objections to the grant of summary judgment. Nor is there any reason to turn this state court case into a reprisal of *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), on when evidence is sufficient to create a material issue of disputed fact. In any event, contrary to PPL's objections, there is nothing inherently problematic - or off limits - about granting summary judgment on navigability issues. Courts and special masters frequently make summary judgment determinations on navigability. PPL's problem is not that the Montana courts improperly applied the standard for summary judgment. Its problem is that it litigated this case based on a mistaken understanding of the legal test for navigability. Thus, for example, PPL did not submit *any* evidence rebutting the fact that the Great Falls and Thompson Falls were portaged so that the rivers served as continuous highways of commerce. Properly ***24** viewed, the summary judgment record supports the judgment of the Montana Supreme Court.

ARGUMENT

I. THE QUESTION PRESENTED RAISES A CORE ISSUE OF FEDERALISM

Montana's title to the riverbeds at issue in this case "uniquely implicate[s]" its sovereign interests. *See Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 284 (1997). Indeed, this Court has long recognized that state ownership of "lands underlying navigable waters" is "an essential attribute of sovereignty." *Utah Div. of State Lands v. United States,* 482 U.S. 193, 195 (1987). Under the equal footing doctrine, the States' title to such lands is conferred "by the Constitution itself." *Idaho,* 521 U.S. at 283 (citations

and internal quotation marks omitted). State ownership over such lands thus represents a core component of federalism. *See Idaho v. United States,* 533 U.S. 262, 272 (2001); *United States v. Alaska,* 521 U.S. 1, 5 (1997); *Montana v. United States,* 450 U.S. 544, 551 (1981); *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436 (1867); *see also* Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 837 & n.69 (1979) (explaining that constitutional equal footing doctrine rests upon considerations of " 'dual federalism' ").

The equal footing doctrine is grounded on the centuries-old "public trust doctrine," which dates back at least to Ancient Rome and was adopted by the English Crown in the Magna Carta. *See Idaho,* 521 U.S. at 284;*supra* at 4-5. The public trust doctrine protects " 'the paramount right of public use of navigable waters,' " and recognizes that the sovereign ***25** holds the submerged lands beneath those waters " 'as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse.' " *Illinois Cent. R.R. Co. v. Illinois,* 146 U.S. 387, 458 (1892) (citation omitted). This principle was vital to the nation at the time of the founding, and before, when navigable waterways served as the primary arteries for inland travel and commerce. And it is embodied in the Northwest Ordinance of 1787, which was later enacted into federal law by the First Congress, and declares that "[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free." [11]

11 An Ordinance for the Government of the Territory of the United States North West of the River Ohio (Northwest Ordinance of 1787) (adopted by the First Congress in 1 Stat. 50, 52 (1789)). Because the Northwest Ordinance existed at the time of the founding and was enacted into law by the First Congress, it is strong evidence of how the Framers viewed the public trust doctrine embodied in the equal footing doctrine.

Especially in view of the constitutional foundation for the State's title to lands underlying navigable waters and its responsibility to manage public trust lands, PPL's attack on the motives of the State in seeking to protect the title to the riverbeds at issue is misguided. This Court generally presumes the good faith of all government actors, including the States. There is no reason to proceed from any other understanding when a State asserts title to public trust lands. Yet PPL essentially asks this Court to adopt a constitutional presumption that state claims of navigability are "contriv[ed]," and apply "a particular ***26** skepticism toward navigability determinations made by a State's own courts in the State's favor." PPL Br. 29-30. That approach would turn upside down cardinal principles of respect for the States, and for the judgments of state courts, that are central to "Our Federalism" and embedded in the constitutional design. This Court of course has the final say over the validity of a State's assertion of title over riverbeds under the equal footing doctrine. But in resolving such claims, there is no basis for proceeding from any premise but that the State has acted in good faith - and on behalf of the public trust it seeks to protect.

Federalism comes into play in another way in this case. To the extent that the riverbeds at issue in this case are held to be *non*-navigable, the United States no doubt would claim title to the lion's share of those lands. *See United States v. Utah,* 283 U.S. 64, 75 (1931); U.S. Br. 1 ("Where the waters were non-navigable at the time of statehood, the United States has asserted its ownership of the riverbeds ...."). As it turns out, the United States government historically has been adverse to the States in cases where title to submerged lands is at issue. *See, e.g., Alaska v. United States,* 545 U.S. 75, 100 (2005); *Utah,* 283 U.S. at 76;*United States v. Oregon,* 295 U.S. 1, 15 (1935); *Oklahoma v. Texas,* 258 U.S. 574, 586 (1922). Here, the United States takes the position that the rivers at issue are navigable for *federal* regulatory purposes, but not for state title purposes - a win-win for the federal government.

Ultimately, the constitutional test of navigability advanced by PPL, and fully backed by the United States, would have the effect of stripping the States of sovereignty over the lands underlying navigable waters by fundamentally narrowing the concept of ***27** navigability long recognized by this Court. At a minimum, the Court ought to approach that far-reaching argument with the caution it typically exercises in matters impeding state sovereignty.

II. THE STATE COURT APPLIED THE PROPER CONSTITUTIONAL TEST FOR NAVIGABILITY IN DECIDING THIS CASE

PPL challenges the "constitutional test" (Pet. i) articulated by the Montana Supreme Court in deciding whether the rivers at issue are navigable. As the United States explained in its invitation brief, PPL's attacks on the Montana Supreme Court's decision are based largely on an "overstate[ment of] the Montana Supreme Court's rationale," U.S. Invitation Br. 10, and a misreading of this Court's precedents, *see id.* at 10-17. Fairly read, the navigability test articulated by the Montana Supreme Court is entirely consistent with this Court's precedents going back to *The Daniel Ball* (1870), and with the historical conception of navigability embodied in the Northwest Ordinance. In the end, it is the constitutional test proposed by PPL - not the one articulated by the Montana Supreme Court - that dramatically departs from settled law.

Indeed, although PPL acknowledges that the test for navigability is constitutionally grounded, it bases its position on a conception of the role of rivers - and trade and travel along rivers - that would have been foreign to the Framers. The Framers lived in a time when rivers provided the major arteries of commerce and travel in North America, and when rivers were regularly portaged so that trade and commerce could continue along the waters. The Framers would have appreciated that "there are but few of our fresh-water rivers which did not originally present serious ***28** obstacles to an uninterrupted navigation." *The Montello,* 87 U.S. at 443. And they would not have conceived of a constitutional test for navigability under which portages around such obstacles would destroy navigability or require chopping up the nation's great rivers into navigable and non-navigable pieces based on the presence of such portageable interruptions.

This Court should reject PPL's invitation to adopt such an ahistorical conception of navigability now.

A. The Montana Supreme Court Applied This Court's Constitutional Test

The Montana Supreme Court based its conclusion that the State owns the riverbeds at issue on its determination that the evidence showed that the Missouri and Clark Fork "provided a channel for commerce at the time of statehood," and that the Madison was "susceptible of providing a channel for commerce at the time of statehood." Pet. App. 56. That analysis comes right out of this Court's decisions.

1. More than a century ago, in *The Daniel Ball*, this Court held that "rivers must be regarded as public navigable rivers in law" if they "are navigable in fact." 77 U.S. (10 Wall.) at 563. Rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.*

Four years later, this Court elaborated on that basic test in *The Montello*, explaining that "the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." 87 U.S. at 441. "If this be so," the Court held, "the river is navigable in fact, although its ***29** navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars." *Id.* The Court rejected "the rule laid down by the district judge as a test of navigability," under which a river is non-navigable insofar as "obstructions" requiring portage prevent "unbroken navigation." *Id.* at 442. As the Court explained, the Northwest Ordinance itself had recognized such "carrying-places," where "boats must be partially or wholly unloaded and their cargoes carried on land," and the district court's test "would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break." *Id.* at 442-43. "Indeed," the Court continued, "there are but few of our fresh-water rivers which did not originally present serious obstacles to an uninterrupted navigation." *Id.* at 443.

Applying *The Daniel Ball* test, the Court held that the Fox River is navigable, notwithstanding "several rapids and falls" in its natural state that impeded "unbroken navigation," even with the use of small "Durham boats," and thus required "a few portages." *Id.* at 439, 441, 442. The Court focused on the history of the Fox River as means of trade - *i.e.*, "highway of commerce"

- in the region and further explained that its test was consistent with "the purpose of the [Northwest] Ordinance of 1787." *Id.* at 442, 444. [12]

12 The United States asserts (at 25) that "the obstructions to navigation [in *The Montello*] were removed by artificial navigation (locks and canals)." That is true - but misleading - because the Court determined that the Fox River was navigable based on the natural state of the river "*before* the navigation of the river was improved." 87 U.S. at 443 (emphasis added).

***30** 2. PPL acknowledges (at 27) that *The Daniel Ball* states the proper test, but claims that the Montana Supreme Court improperly relied on *The Montello* and so-called non-title cases. According to PPL, because *The Montello* did not address "*title* navigability," it does not count. PPL Br. 42 (emphasis added). PPL's attempt to sink *The Montello* is understandable - it answers PPL's theory that portaged interruptions destroy navigability. But PPL's argument fails.

The Montello Court did not believe that it was doing anything but applying *The Daniel Ball* test to the Fox River stretch at issue. The very first sentence of the decision refers to *The Daniel Ball*; the following sentences set forth the constitutional test established by *The Daniel Ball*; and the decision then states that the Court's holding is based on the "[a]ppl[ication]" of that test. 87 U.S. at 439. Moreover, far from purporting to break new ground, the Court observed that "[t]he views that we have presented on this subject receive support from the courts of this country that have had occasion to discuss the question of what is a navigable stream." *Id.* at 443 & n.16 (citing cases).

In the 140 years since they were decided, this Court has consistently relied on *The Daniel Ball* and *The Montello* in stating the constitutional test for state title to submerged lands. The Court did just that in *Utah* - the "title" case on which PPL and the United States principally rely. There, the Court drew the "test for navigability" - as "frequently stated by this Court" - directly from *The Daniel Ball* and *The Montello*. *Utah*, 283 U.S. at 76;*see also, e.g., Packer v. Bird*, 137 U.S. 661, 667 (1891) (relying on *The Daniel Ball*); *Oklahoma*, 258 U.S. at 586 (citing *The Daniel Ball* and *The Montello*); ***31** *Brewer-Elliott Oil & Gas Co. v. UnitedStates*, 260 U.S. 77, 86 (1922) (invoking *The Montello*'s "channel for useful commerce" test); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (citing *The Montello*); *Oregon*, 295 U.S. at 15 (relying on *The Daniel Ball*).

This Court also has observed that courts should be mindful of "the purpose for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979). And the Court has adapted *The Daniel Ball* and *The Montello*'s test for navigability in three specific respects depending on the context in which it is invoked: (1) for title cases, the Court looks to the river's natural state, whereas for regulatory cases it considers the river's natural *and* improved condition; (2) for title cases, the Court determines navigability as of the time of statehood, whereas for regulatory cases it considers the river's condition today; and (3) for title cases, the Court asks whether the river was part of a useful channel for commerce, local or otherwise, whereas for regulatory cases it requires the river to be part of a channel of *interstate* commerce. *See* U.S. Br. 9-10. But these settled variations are in no way implicated by the decision under review: The Montana Supreme Court considered navigability at the time of statehood, looked to the rivers' natural state, and considered whether the rivers were part of a useful channel of commerce. Pet. App. 54-62.

It simply does not follow, as PPL suggests, that navigability cases from one context are categorically inapposite - and should be rigorously segregated from - cases that arise in other contexts. The inquiries overlap far more than they diverge. That is why this Court has relied on title and regulatory cases ***32** interchangeably, except insofar as the settled distinctions above are implicated. Indeed, even PPL does not follow its own proposed dichotomy, because it relies affirmatively on regulatory cases, when it suits its own interests to do so. *See* PPL Br. 37, 49, 54 (relying on non-title cases); Pet. 21, 24. The dichotomy that PPL and the United States now try to create between *The Daniel Ball* and *The Montello* is completely artificial and out of step with precedent.

Principles of *stare decisis*, not to mention the need for "certainty and predictability" that PPL itself touts (at 33), counsel strongly against reconceiving more than a century of this Court's navigability precedents by retroactively holding that this Court's title

and regulatory cases must be rigidly compartmentalized in a way that is completely at odds with this Court's own reliance on and use of those precedents.

B. The Montana Supreme Court Properly Considered The Stretches That Comprised The Relevant Channels Of Commerce

PPL argues (at 40) that the Montana Supreme Court erred by taking a " 'whole river' approach" (at 40) to navigability, without considering navigability on a "segment-by-segment basis" (at 34). That argument is a straw man. The phrase "river as a whole" (or anything like it) does not appear in the Montana Supreme Court's decision. And the State has never argued, and the Montana courts did not hold, that a river that is navigable "as a whole" is necessarily navigable in fact along its entire length. At the certiorari stage, the United States recognized that PPL's "river as a whole" argument was based on an "overstat [ement of] the Montana Supreme Court's rationale" (U.S. Invitation Br. 10), though in its merits- ***33** stage brief it chooses to perpetuate that mischaracterization itself (U.S. Br. 11-12, 18).

The Montana Supreme Court analyzed whether the rivers at issue were navigable by looking not to the rivers "as a whole," and not to natural interruptions in isolation (as PPL proposes), but by considering whether the stretches of the rivers that included the interruptions on which PPL focuses formed a continuous highway for commerce, notwithstanding the interruptions. Pet. App. 56. That analysis is perfectly consistent with this Court's precedents.

1. The crux of PPL's challenge to the navigability of the Missouri and Clark Fork is that the Montana Supreme Court should have focused exclusively on the natural interruptions - on which PPL's power plants generally sit - and should have disregarded the surrounding stretches of the rivers. *See, e.g.*, PPL Br. 40, 41, 59. As PPL sees it, because "boats ... could not pass the falls area itself," the riverbeds at issue are not navigable - end of story. *Id.* at 12; *see id.* at 8, 15-16, 46; *see also* Pet. App. 198 (emphasizing that "there has *never* been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it") (Emmons); *id.* at 202 (same concerning Thompson Falls). The United States repeats this refrain. U.S. Br. 22 (emphasizing that the *falls themselves* were "impassable"). The Montana Supreme Court properly rejected that line of analysis.

PPL's argument is based almost entirely on *Utah,* which PPL says (at 36) "exemplifies the segment-by-segment approach." According to PPL, *Utah* holds that a court must analyze not just "the specific river sections at issue" but any "stretches *within* those sections that [have] distinct topographical ***34** characteristics." PPL Br. 37 (emphasis added). Anything but a "*de minimis*" or "negligible" obstacle, PPL maintains (at 38), must be analyzed separately - and would almost certainly be deemed non-navigable in PPL's view, since an obstacle is by definition impassable. That approach finds no footing in *Utah.*

The *Utah* Court did not carve up the Colorado River like a Thanksgiving turkey, hacking away at every non-*de minimis* portion containing a natural obstacle and considering it in isolation as a new "stretch" with each change in the river's physical characteristics. Rather, the Court analyzed the head of navigation and concluded that, despite many obstructions in its natural state, the entire Colorado river was navigable, with the exception of a 36-mile stretch (Cataract Canyon), which had *never* been entirely portaged and had geological features making that portage infeasible. The Court therefore concluded that the Colorado ceased to be navigable at that point. *See*283 U.S. at 77;*see also* PPL Supp. Br. App. 10-13.

Cataract Canyon is completely different than the Great Falls and Thompson Falls, and not just because - at 36 miles long - Cataract Canyon is more than *twice* as long as Lewis and Clark's 17-mile portage around the Great Falls. Unlike the Great Falls and Thompson Falls, Cataract Canyon was "not ... fully portaged." U.S. Br. 23 n.13. *Parts* of the canyon were portaged. *See* PPL Supp. Br. App. 12. But there is no evidence that the canyon was portaged so that the waterway - above and below the canyon - served as a continuous highway of commerce, or even that the canyon was susceptible to such use. Instead, it was uncontested that the canyon, and its forbidding terrain (*see id.*), created a dead end. In this case, by contrast, ***35** it is undeniable that trade and travel portaged around the falls in question and that the river stretches served as *continuous* public highways of commerce.

PPL also points to *Oklahoma v. Texas*, 258 U.S. 574 (1922), and argues (at 38) that instead of analyzing the entire 1360-mile Red River the Court considered "the much shorter segment at issue." But that "much shorter segment" was 539 miles long - *i.e., the entire length* of the Red River in the State of Oklahoma. 258 U.S. at 582, 585 & n.4. Moreover, the Court considered that entire 539-mile stretch even though the dispute between Oklahoma and Texas concerned "the proceeds of oil and gas taken from 43 miles" of the riverbed. *Id.* at 579. *Oklahoma* thus provides no support for the kind of piecemeal segmentation approach that PPL advances here, which requires a court to break a river up into navigable and non-navigable segments for any interruption that is not *de minimis*. [13]

13 The other cases relied upon by PPL for its novel segmentation regime are also inapposite. *See* U.S. Invitation Br. 12-13 (explaining that these cases "did not address how to treat non-navigable 'middle section[s] of an otherwise-navigable river' ") (quoting Pet. 20) (alteration in original)).

2. PPL does not define what counts as a "*de minimis*," or "negligible," interruption for purposes of its über-segmentation approach. But it latches on to *Utah*'s consideration of "the first 4.35 miles of the stretch of the Colorado river" at issue in that case and argues that that stretch is not *de minimis*. PPL Br. 38. As the United States explained in its invitation brief (at 11), "*Utah* does not stand for the legal proposition that any 4.35-mile interruption in navigability must be treated as a distinct segment." Indeed, the "4.35-mile ***36** segment" relied upon by PPL (at 38) is not an *interruption* at all. Rather, Utah argued (and this Court agreed) that those 4.35 river miles properly belonged with the navigable waters upstream (the Green and Grand Rivers, which came together to form the Colorado), not the Cataract Canyon stretch that everyone agreed was non-navigable. *See Utah*, 283 U.S. at 89;*see also* U.S. Invitation Br. 12.

Moreover, elsewhere in *Utah* the Court made clear that it did not view a distance of 4.35 miles as significant in the context of a river like the Colorado, calling the 4.35 miles a "short stretch." 283 U.S. at 89. Likewise, the *Utah* Court saw no problem with the special master's reference to one stretch of the Grand River as "*only* six miles in all." *Id.* at 85 (emphasis added). Characterizing a stretch of several miles as "short" might seem odd in the abstract, but it is not in the context of *a river*. *Cf. Nebraska v. Wyoming*, 325 U.S. 589, 596 (1945) (referring to "short stretch" of "40-odd miles" of a river). And in the same vein, to the extent that it has any constitutional relevance to the navigability inquiry here, the stretches at issue in this case are likewise properly regarded as "short."

But as cases like *The Montello* teach, what matters in gauging navigability is not whether an interruption is one mile, 4.35 miles, or 20 miles long. What matters is whether the attendant stretch of the river served as a continuous highway of commerce - notwithstanding the interruption. *Supra* at 28-30. If PPL's position had been law, then the Court's decision in *The Montello* would have simply focused on identifying the impassable segments of the Fox River, isolated those segments from the rest of the river, and declared them to be non-navigable. That, in essence, is what the ***37** *district court* did in *The Montello*. *See* 87 U.S. at 442. But this Court rejected that approach and looked to whether the rivers served as continuous highways of commerce - despite the obstacles. *Id.* at 442-43.

This does not mean that interruptions cannot defeat navigability. They can - and do. The longer or more severe the interruption, the more difficult it will likely be to establish navigability. In *Utah*, for example, it was clear that the highway of commerce *stopped* at the 36-mile Cataract Canyon; no one argued that the canyon was portaged to connect a trade route along the river above and below the canyon. This case is just the opposite. As the Montana Supreme Court explained, on the Missouri the Great Falls was portaged so that trade flowed from Three Forks to Fort Benton. Pet. App. 61. And on the Clark Fork, Thompson Falls was portaged to establish a trade route from the confluence of the Flathead River (above the falls) to Lake Pend Oreille in Idaho. *Id.*; *see supra* at 9-12.

The focus on whether the pertinent stretches were used as (or are susceptible for use as) a highway of commerce establishes a workable and time-honored principle grounded on more than a century of case law. By contrast, PPL's hyper-segmentation rule is highly manipulable and seems designed primarily to aid hydroelectric generators whose plants generally sit on interruptions. PPL offers little guidance, other than its vague "*de minimis*" or "negligible part" exception, on what interruptions do *not* qualify

for segmentation. PPL's test thus is a recipe for uncertainty in an area in which PPL itself (at 33) demands "predictability," and will require courts to go back and carve up waterways that have long been found navigable into "navigable" and "non-navigable" pieces. After all, "there are but *38 few of our fresh-water rivers which did not originally present serious obstacles to an uninterrupted navigation." *The Montello,* 87 U.S. at 443.

C. The Montana Supreme Court Properly Recognized That Portaging Does Not Automatically Defeat Navigability

In a variation on their segmentation argument, PPL and the United States argue that portaged interruptions on a river are not "themselves navigable for the ... purpose of establishing title." PPL Br. 42; *see* U.S. Br. 23-27. In other words, according to PPL and the United States, any non-*de minimis* interruption requiring portage is non-navigable for title purposes. That position is inconsistent with the purposes of the public trust and equal footing doctrines as well as more than a hundred years of precedent.

1. As discussed, this Court has recognized since *The Montello* that falls, rapids, or other interruptions requiring portage do not destroy navigability - so long as the surrounding stretch of the river served as a useful channel for commerce. *Supra* at 28-30. And this Court has repeatedly reaffirmed - pointing to *The Daniel Ball* and *The Montello* - that "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages." *Economy Light & Power Co. v. United States,* 256 U.S. 113, 122 (1921); *see id.* at 121-22. Indeed, in *Economy Light & Power Company,* the Court confirmed the navigability of a river stretch that included over 24 miles of nearly-consecutive interruptions, including "a 7-mile portage," and a land "transfer of over 11 miles." *Economy Light & Power Co. v. United States,* 256 F. 792, 795-96 (7th Cir. 1919); 256 U.S. at 124 (affirming); *see also* *39 *St. Anthony FallsWater Power Co. v. St. Paul Water Comm'rs,* 168 U.S. 349, 359 (1897) (holding river stretch navigable "at all points" including waterfall and surrounding rapids).

Likewise, other federal and state courts - in both the title and regulatory contexts - have recognized that portageable obstacles do not destroy navigability, and settled expectations have formed based on this rule.[14] To take just one example, it has been settled for more than 50 years that the riverbeds underlying Niagara Falls, which of course required a portage, are owned by the State of New York - "even at the point of the falls." *Niagara Falls Power Co. v. Duryea,* 57 N.Y.S.2d 777, 784 (Sup. Ct. 1945); *see also In re State Reservation at Niagara,* 37 Hun. 537, 16 Abb. No. Cas. 395 (N.Y. Sup. Ct. 1885), *appeal dismissed,* 7 N.E. 916 (1886). Under PPL's rule, however, the riverbeds underlying the falls would have to be carved out and declared non-navigable for title purposes.

14 *See, e.g., Knott v. FERC,* 386 F.3d 368, 372-73 (1st Cir. 2004); *Muckleshoot Indian Tribe v. FERC,* 993 F.2d 1428, 1433 (9th Cir. 1993); *Consolidated Hydro, Inc. v. FERC,* 968 F.2d 1258, 1261 (D.C. Cir. 1992); *Montana Power Co. v. FPC,* 185 F.2d 491, 493-94 (D.C. Cir. 1950); *Pennsylvania Water & Power Co. v. FPC,* 123 F.2d 155, 163 (D.C. Cir. 1941); *Alaska v. United States,* 662 F. Supp. 455, 466-67 (D. Alaska 1987), *aff'd, Alaska v. Ahtha,* 891 F.2d 1401 (9th Cir. 1989); *see also* 27 William Mark McKinney & Burdett Alberto Rich, *Ruling Case Law,* Waters, § 218, at 1310 (1920); *see generally* John A. Humbach, *Public Rights in the Navigable Streams of New York,* 6 Pace Envtl. L. Rev. 461(1989).

2. PPL tries to tackle *The Montello*'s rule that portaging does not defeat navigability in two different ways. First, it argues that *The Montello* "addressed *regulatory* navigability, not title navigability." PPL Br. 42. But that is beside the point because, as *40 discussed, this Court has for more than a century relied upon *The Montello* interchangeably with *The Daniel Ball* in describing the constitutional test for navigability - and even did so in *Utah*, the case that PPL itself holds out as the vanguard for "title navigability." *See supra* at 31-32. Second, PPL argues that *Utah* establishes that "portageable interruptions" *do* defeat navigability, pointing to the fact that the Court held that the Cataract Canyon stretch was not navigable. PPL Br. 42. As discussed, however, Cataract Canyon was not fully portaged and so commerce came to a dead end at the canyon. In that key respect, *Utah* is entirely different from *The Montello* - and this case. *Supra* at 34-35.

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (*AEP*), cited by the United States, is not to the contrary. As the United States itself concedes (at 25), that case did not involve "any obstructions requiring a portage." Moreover, in the passage relied upon by the government, the Court simply noted differences between the title and regulatory inquiries that are

not pertinent here - namely, the fact that the regulatory inquiry is not confined to the time of statehood or the rivers' natural state. *See*311 U.S. at 407-08. But, as the Montana Supreme Court recognized (Pet. App. 56), the State's assertion of title to the Missouri and Clark Fork here is based on evidence of actual use of the rivers in their natural state and before statehood. *Supra* at 18-19. [15]

15 The United States suggests (at 24-25) that this Court should draw a negative inference from Congress's definition of "navigable waters" in 16 U.S.C. § 796. This is a 180-degree change from the government's position before this Court in *Montana Power Company*, where the Solicitor General told the Court that "this definition is *in accord with* established principles," and specifically invoked the holding in *The Montello*. Add. 8a (emphasis added). The United States was right then. Section 796 expands the navigability inquiry in certain respects for regulatory purposes (natural vs. improved condition and statehood v. present-day use), but not insofar as it recognizes that portages do not destroy navigability. More important, nothing in § 796 could narrow the *constitutional* definition of navigability for title purposes.

***41** 3. As a fallback, PPL suggests (at 42) that "this Court's precedent at most might permit treating a portageable stretch of an otherwise navigable river as itself navigable for title purposes only if it qualified as a 'short interruption' or 'negligible part' within the meaning of *Utah*." *See* U.S. Br. 24. PPL takes this Court's language out of context and fails to account for the fact that "short" is a relative term when it comes to describing something like a river. *Supra* at 36. But in any event, that standard is unworkable for the same reasons that PPL's "*de minimis*" or "negligible part" exception to its segmentation rule is impracticable. *See supra* at 35-37. And once it is recognized (as this Court has held since *The Montello*) that portages do *not* defeat navigability where the river is used as a continuous highway of commerce, then there is no constitutional or principled basis for arbitrarily cutting off navigability at a particular mile marker.

PPL argues (at 42) that the 17-mile portage of the Great Falls was too long and "arduous" to qualify under this test. Early Americans, particularly those who helped settle the West, had a hardier conception of distances than the typical modern day city slicker. ***42** Lewis and Clark, for example, regularly traveled 20 or more miles a day during their expedition. There is no reason why the Constitution would draw a distinction between a 17-mile portage and a one-, five-, or 10-mile portage. *Cf. Economy Light & Power, supra* (7-mile portage). Actions speak louder than labels. By definition, any interruption that was in fact portaged to allow the river to continue to serve as a highway of commerce is "short" enough for any constitutionally relevant navigability purpose.

Moreover, the question for purposes of this case is not how long it took *Lewis and Clark* to portage the Great Falls - on the first try by any explorer, in an unknown territory roamed by grizzlies, with a full expedition (and a seriously ill Sacagawea) in tow. It is whether the falls were portaged at statehood so that the river was used as a highway of commerce. They were. By the 1860s, the portage was conducted regularly by large numbers of miners under far less "arduous" conditions and in a fraction of the time. *See supra* at 10-11. This history conclusively refutes PPL's suggestion (at 41) that the Great Falls portage was "wholly incompatible with commercial navigation." [16]

16 The possibility that a river "could be portaged *in theory*" does not establish navigability. U.S. Br. 24 (emphasis added). Just as the application of the "susceptibility for use" prong of *The Daniel Ball*'s navigability test must be based on a realistic assessment of what is susceptible, so too must an assessment of the feasibility of portage. For example, given the history and geography of Cataract Canyon (*see supra* at 34), the theoretical possibility that an Ernest Shackleton might find a way to portage the canyon is not enough to establish navigability. Moreover, the key point is not simply whether the river was portaged, but whether it was portaged so that the river served *as a continuous highway of commerce*. As discussed, the river stretches here were not simply portageable "in theory"; they were regularly portaged *in fact* by those using the rivers as public highways of commerce.

***43** 4. Finally, PPL's and the United States' position that portage always (or invariably) defeats navigability is out of step with the history of the nation - and the geography of North America. As *The Montello* recognizes in discussing the travels of the likes of Marquette and Joliet (87 U.S. at 440), portaging was a common means of overcoming obstructions along waterways that indisputably served as key channels of commerce and trade. The many towns and rivers across the country with "portage"

in their name - like Portage City, Wisconsin (*id.* at 439) and Portage Creek, Montana - not to mention the reference to the "carrying places" in the Northwest Ordinance, speak volumes about how deeply ingrained the practice of portage was in early American travel and commerce. Adopting PPL's position would disregard the deeply rooted historical fact that interruptions necessitating portages did not prevent a river from serving as a public highway of commerce in America.

D. The Montana Supreme Court Properly Considered The Madison's Susceptibility For Use As A Highway Of Commerce

PPL's remaining criticisms of the Montana Supreme Court's decision relate principally to the Madison River and focus on its articulation of the "susceptible-for-use" prong of the navigability test. Here again, PPL's attacks prove unfounded.

***44** 1. PPL acknowledges that *The Daniel Ball* test considers not only whether a river was actually used as a highway of commerce at statehood, but whether it is " '*susceptible* of being used' " as such. PPL Br. 27 (quoting *The Daniel Ball,* 77 U.S. at 563 (emphasis added)). But PPL argues that this Court should convert the *alternative* "susceptibility" prong into a "rare" exception that can be invoked only when there is "limited or non-existent settlement in the region, and even then only if river conditions are the same today as at statehood."*Id.* at 26; *see id.* at 43, 45. In other words, without asking this Court to overrule any precedent, PPL essentially asks this Court to all but scuttle the "susceptibility for use" prong.

The "susceptibility for use" prong has been a fixture of the constitutional test for 140 years. *The Daniel Ball,* 77 U.S. at 563;*Utah,* 283 U.S. at 76;*Holt State Bank,* 270 U.S. at 56. There is no evidence that it has proved unworkable or ineffectual in screening navigability claims. To the contrary, the "susceptibility for use" inquiry makes perfect sense in light of the purposes of the equal footing and public trust doctrines. The Founders no doubt understood that not all navigable rivers in America would have documented instances of commercial trade at the time of statehood. And although the navigability test is focused on navigability *at the time of statehood,* there is no reason to deny States title to rivers that were capable of meeting the navigability test at statehood.

Under well-settled law, the Montana Supreme Court in no way erred in holding that the Madison was navigable based on its conclusion that the Madison "was susceptible of providing a channel for commerce at the time of statehood." Pet. App. 56.

***45** 2. PPL tries a backdoor attack on the "susceptibility for use" prong by arguing (at 47) that this Court should adopt a rule that reliance on "modern-day usage" is "strongly disfavored." But there is no reason for this Court to adopt a special evidentiary rule for navigability determinations. The ordinary rules of evidence, including the rule of relevance (*e.g.*, Mont. R. Evid. 401), suffice. This Court has long recognized that post-statehood evidence may be "relevant upon the issue of the susceptibility of the rivers" when it shows that the rivers were used as highways of commerce at the time of statehood. *Utah,* 283 U.S. at 82;*see* U.S. Invitation Br. 15 (recognizing that such evidence "may be probative of navigability at statehood"). The Montana Supreme Court simply recognized that commonsense rule. *See* Pet. App. 55-56 (given that navigability be based on actual use or susceptibility for use, "present-day usage of a river *may be probative* of its status as a navigable river *at the time of statehood*") (emphasis added).

Nor is there anything suspect about the *way* in which the Montana Supreme Court consulted post-statehood evidence. PPL claims (at 48) that the court failed to take into account that the flow of the river was altered by PPL's dams. But the Montana Supreme Court specifically recognized that the flow of the river had been "altered" by PPL's dams, albeit not in the way PPL would have liked. Pet. App. 58; *see id.* at 57. As the court - and PPL's own expert - recognized, the dams *reduced* the flow of water along the Madison during most of the year. *Id.*; *see* Pet. App. 210-11 (Schumm). The Montana Supreme Court could take that asserted change into account and conclude that - since the river would have been only *more* navigable ***46** before the dams at least part of the year - the evidence of substantial drift boat use on the Madison today was relevant to, and supported, a finding of navigability at statehood. Resp. Mont. S. Ct. Br. 31-32.

3. PPL's highly restrictive test for the "*kind* of commerce that counts" (at 49 (emphasis added)) in gauging navigability also should be rejected. This Court has admonished that navigability for title " 'does not depend on *the mode* by which commerce is, or may be, conducted.' " *Utah*, 283 U.S. at 76 (emphasis added). And the Court has recognized log-floating, in particular, as a legitimate form of "commerce" for purposes of determining a State's title to navigable waters for at least 114 years. *St. Anthony Falls Water Power Co.*, 168 U.S. at 359 (relying on fact that river stretch had been used for floating "logs with chutes that are artificially prepared" in finding navigability, even though it was asserted that the stretch could not support boat traffic); *see also The Montello*, 87 U.S. at 441 (including as navigable "many of the large rivers of the country over which *rafts of lumber of great value* are constantly taken to market") (emphasis added).

The West's lumber industry in the late 19th century depended on rivers to transport lumber to market. *See Wisconsin Pub. Serv. Corp. v. FPC*, 147 F.2d 743, 746 (7th Cir. 1945). Logs were as much a commodity on rivers as the load of any steamboat. In line with this Court's cases, the lower courts have long treated commercial log-driving as a commercial use sufficient to establish navigability. *See, e.g., Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258,1261 (D.C. Cir. 1992); *City of Centralia v. FERC*, 851 F.2d 278, 281-82 (9th Cir. 1988); *Wisconsin v. FPC*, 214 F.2d 334, 336-37 (7th Cir. 1954). In considering evidence of log floating to assess *47 the navigability of the Madison, therefore, the Montana Supreme Court took a well-worn path.

There also is no reason categorically to exclude evidence of "recreational" uses of a river - especially when it comes to recreational uses like drift-boat fishing or rafting with both a substantial commercial and boating component. PPL Br. 49-52. This Court has recognized that recreational boat use of a river is probative of navigability, because "personal or private use by boats demonstrates the *availability* of the stream for the simpler type of commercial navigation." *Appalachian Elec. Power*, 311 U.S. at 416 (emphasis added). That is certainly true in the case of the Madison, which is floated in commercial drift boats by thousands of anglers each year. Opp. App. 63. [17]

17 PPL also criticizes (at 22, 54-58) the Montana Supreme Court's statement that "[t]he concept of navigability for title purposes is very liberally construed by [this Court]." Pet. App. 54. But that statement must be read in context. The very next sentence refers to the fact that this Court's own precedents compel a finding of navigability not only where a river was actually used as a highway of commerce at statehood, but where it was *susceptible* for use as such. Presumably the reason that PPL asks this Court to discard the susceptibility-for-use test is that it believes the test *is* expansive. In any event, the rest of its decision makes clear that the Montana Supreme Court framed the proper constitutional test in deciding the navigability of the rivers at issue. And this Court, of course, "'reviews judgments, not statements in opinions.' " *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011).

*48 III. THE STATE COURT CORRECTLY FOUND THAT SUMMARY JUDGMENT WAS PROPER ON THE HEARING RECORD

1. PPL sought certiorari on a purely legal question concerning the "constitutional test" for navigability. Pet. i. It framed the question in terms of what the "constitutional test" for navigability requires "*a* trial court" to do. *Id.* (emphasis added). No doubt appreciating that this Court ordinarily does not second-guess the fact-specific determinations of state courts, PPL did not seek certiorari on whether the Montana trial court correctly held that summary judgment was proper on the particular record before it - assuming the court articulated the proper "constitutional test." That issue is outside the question on which this Court granted certiorari. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193 (1997) (where the petition asked the Court to decide the legal rule, we "shall not go beyond the writ's question to reexamine the fact-based rule-application issue that the [petitioners] now raise"). Thus, if this Court agrees with the State that the Montana Supreme Court framed the correct constitutional test for navigability, it should affirm.

2. In any event, PPL's argument that the Montana courts improperly granted summary judgment in this case suffers from several basic methodological flaws. To begin with, PPL has exaggerated the evidence that it properly presented to the Montana trial court on summary judgment. *Supra* 18 & n. 9. In addition, PPL erroneously suggests (*e.g.*, PPL Br. 2) that there is something inherently problematic about granting summary judgment on navigability, or navigability-for-title issues. That suggestion is refuted by this Court's precedents and widespread practice before the courts *49 and special masters. Trial courts across

the country frequently make summary judgment determinations on matters of navigability or the like, as do special masters appointed by this Court in original actions. [18]

18 *See, e.g., Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1406 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *Illinois v. Army Corps of Eng'rs*, No. 79 C 5406, 1981 U.S. Dist. LEXIS 14165, at *6-7 (N.D. 111. Jan. 9, 1981); *Alaska v. United States*, 662 F. Supp. 455, 468 (D. Alaska 1987); *United States v. Underwood*, 344 F. Supp. 486, 496 (M.D. Fla. 1972).

Alaska v. United States, 545 U.S. 75 (2005), for example, involved a dispute over title to submerged lands that - like this case - turned in large part on historical materials. And like this case, *Alaska* was resolved on summary judgment. Special Master Gregory Maggs explained that despite numerous "genuine disagreements" between the parties, "summary judgment is an appropriate mechanism" for resolving the underlying title claim because the parties' disagreements were "really over the interpretation of the available undisputed facts" and the relative legal significance of available documents. *Alaska v. United States*, No. 128, original, Special Master's Report at 17-22 (2004), *available at* http://docs.law.gwu.edu/facweb/gmaggs/128orig/summary_ judgment_report.pdf. This Court affirmed the special master's "thorough, commendable report" and findings. 545 U.S. at 83, 96.

Here, the "genuine disagreements" among the parties relate primarily to the proper *legal significance* of undisputed, or indisputable, historic facts. That is especially true for the Missouri and Clark Fork Rivers, where there is indisputable evidence that Great Falls and Thompson Falls did not prevent the rivers from ***50** serving as continuous highways of commerce, with the aid of portage. *See supra* at 10-12. PPL did not offer any evidence disputing the historical fact that the falls were portaged so that the rivers could serve as highways for commerce at statehood. Instead, PPL argued that there was no evidence that anyone boated the falls themselves. *See supra* 33. As explained, that legal theory is incorrect. [19]

19 As to the Clark Fork, PPL has pointed to a 1910 federal district court decree - a judgment issued two decades after statehood concerning alleged property rights as between two *private* parties - that referred in dictum to the Clark Fork generally as "not navigable" without any underlying findings of fact relevant to that conclusion. *See* Supp. Pet. App. 11. The Montana Supreme Courts properly concluded that this statement - which was not binding on the Montana courts or any party in the case - was the epitome of the kind of conclusory statement that does not create a genuine issue of material fact. Pet. App. 57; *see Williams v. Union Fid. Life Ins. Co.*, 123 P.3d 213, 218 (Mont. 2005) ("[M]ere conclusory ... statements" do not raise a genuine issue of material fact.).

While a closer call, PPL has presented no reason for this Court to overturn the Montana courts' summary judgment determination as to the Madison either. The State presented evidence that the Madison was susceptible for use as a highway of commerce at statehood and, indeed, was ideal for log driving. *See supra* at 14. Even the dissent on the Montana Supreme Court acknowledged that "the State met its initial burden to prove navigability under the title test." Pet. App. 116. PPL points to a Corps Report that evaluated - more than 40 years after statehood - the river's potential for improvements for *modern-day* use. JA 485-86. But that report has no bearing on ***51** whether and to what extent the river was susceptible for use by the common modes of navigation at statehood. PPL also relies heavily on Schumm's testimony that the flow of the Madison changed after the dams were built. But, as the State explained (Resp. Mont. S. Ct. Br. 31-32), Schumm's own conclusions on the changes in flow made it *more* likely that the Madison was susceptible for use as a highway of commerce for at least part of the year. *See Utah*, 283 U.S. at 87 (river need not be navigable year-round).

3. Finally, PPL attacks the State's historical evidence, suggesting (at 15) that frontier newspapers and similar historical sources are somehow off limits in determining navigability. PPL's paid expert Emmons argued below (as he does in this Court, as "amicus curiae") that these materials are categorically unreliable, because they supposedly rely on sources given to "hyperbole" or "fabrication." Br. of Professors 20-21. But this Court itself has relied on such sources in determining navigability. *See, e.g., The Montello*, 87 U.S. at 440-42;*see also, e.g., Alaska*, 545 U.S. at 82, 96 (Special Master Report relies on historical accounts); *Montana Power Co. v. FPC*, 185 F.2d 491, 498 (D.C. Cir. 1950) (relying on advertisements of boat service in contemporary

Helena newspapers and holding that newspaper accounts "are among the source materials of history"). The Montana Supreme Court in no way erred in considering such historical materials. [20]

20 Paradoxically, Emmons himself has relied heavily on the same frontier newspapers. *See, e.g.*, J A 758 nn. 24-25, 760 n.27, 765 n.32, 791 n.67, 792 n. 68, 797 n.74, 798 n.75, 801 n.78.

*52 Contrary to the caricature of judicial proceedings that PPL tries to paint, the Montana courts carefully considered the summary judgment record under the constitutional test for navigability established by this Court's precedents and reasonably concluded that PPL had failed to create a genuine issue of disputed fact precluding summary judgment. There is no reason for this Court to re-do the summary judgment determination for the Montana courts. The Court should address the question presented and affirm.

*****

Adoption of PPL's novel constitutional test for navigability would have the immediate practical effect of stripping Montana - and Montanans - of the title that they gained to the riverbeds at issue upon admission into the Union in 1889. That includes title to the Great Falls of Montana - a symbol of Montana since territorial times. [21] But the impact of such a ruling would extend much further. PPL's test would call into question the navigability of rivers throughout the United States - at least in any place where there exists (or existed) a non-*de minimis* interruption. At a minimum, that test is a recipe for confusion and litigation over title to submerged lands throughout the country. And worse, the test is likely to result in the balkanization of rivers, like the Missouri, that always have been regarded as navigable, into bits and pieces of navigable and non-navigable "segments." That result almost certainly would interfere with the management of fish and wildlife along such waterways and hinder *53 public access to the waters for fishing. And it could scarcely be more at odds with the public trust doctrine - embodied in the constitutional equal footing doctrine - which sought to ensure that America's great rivers and waterways would remain "common highways, and forever free," for the benefit of the people. Northwest Ordinance of 1787, 1 Stat. at 52.

21 For the history of the Great Seal of the State of Montana, see http://sos.mt.gov/about_office/State_Seal.asp.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Montana should be affirmed.

ADDENDUM

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2613

***3a No. 518**

October Term 1950

The Montana Power Company, a corporation, petitioner

V.

Federal Power Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

***

STATEMENT

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Actual Use: For the steamboats which came up the River from St. Louis, the Great. Falls presented a natural barrier (R. 65). As a result, Fort Benton was sometimes labelled [sic] the "head of navigation," and until 1888, when the advent of the railroads curtailed the demand for water transportation, steamboat traffic up to Fort Benton flourished (R. 64-65, 543-558, 1014-15, 1434). The record shows, however, that three steamboats from Fort Benton successfully navigated the River to points more than 30 miles upstream from ***4a** Fort Benton and back (R. 65, 215-216, 1013, 1141-1142, 1207, 1450). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft; for this upper part of the River, the "foot of navigation" was sometimes placed just above the Falls (R. 1207; Ex. 17(a) (1880), p, 1474).

Before 1900, there was considerable use of the 263-mile reach of the River above Fort Benton, the Falls always requiring a portage around them. A number of exploratory and Government survey trips were made in manually-powered crafts of various sizes, notably the 1805 expedition under Lewis and Clark, whose party made a successful ascent to Three Forks and beyond (R. 64-65, 1357-1383, 1549-1575). In 1872, Thomas P. Roberts, an engineer for the Northern Pacific Railroad, in the course of a survey of this part of the River, descended the River from Three Forks to Fort Benton in a skiff (R. 66, 1147-1208).[7] In addition, Hubert Howe Bancroft's (1890) "History of the Pacific States" records the use of the River between Stubbs Ferry (mile 2390), about 85 miles below Three Forks, and Fort Benton for the transportation of large numbers of miners returning to the States following the 1864 discovery of gold where Helena is now located; according to Bancroft, a stage line was established to carry passengers from Helena to a point ***5a** on the River whence was operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (R. 66-67,1415-1419).[8] This use of the River apparently started soon after the 1864 discovery of gold in Helena, probably diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted; clearly, however, the business was lively around 1866-1867 (R. 67).[9]

7 Roberts concluded that the River above Fort Benton could be relied upon for navigation without improvement and his report supported a plan for a steamboat link between Fort Benton and Three Forks, trans-shipping freight around the Falls (R. 66, 1195-99). The Roberts' report was regarded as so useful that the Secretary of War approved its publication for use of the Army Engineers (R. 1147).

8 Although no description of those boats is available, it seems certain that they were manually-powered and probably were large sharpended bateaux (R. 67).

9 Bancroft's account is confirmed (1) by advertisements of the boat service in contemporary Helena newspapers (R. 67, 1417, 1139-1141, 1210), and (2) by an 1867 legislative grant of an exclusive privilege for a portage-toll road to the Missouri River Falls Wagon Road Company (Mont. Laws, Territory, 1867, 4th Reg. Sess., p. 109.) (R. 67)

Between 1867 and 1900, there was extensive intrastate use of the River between Stubbs Ferry and Great Falls for the downstream transportation of loose logs and large rafts of lumber (R. 66, 417-418, 1142-1146, 1209, 1224-1228, 1263-1265, 1328-1329). Also, several small steamboats were placed on the River above the Falls, for the most part in the period after the close of the navigation era below Benton (R. 66). This operation continued around 1900 and was confined principally to the 55-mile stretch known as "Long Pool," located immediately above the Great Falls (R. 66, 391-397, 563-564, 1313-1315, 1323-1327, 1343, 1354, Ex. 17(b) (1892) p. 1906, (1895) p. 2227, (1898) p. 1850). Some steamboats were engaged in the local, *6a commercial carrying of freight and passengers (R. 66). [10]

10 The Annual Report of the Chief of Engineers for the Year 1901 (Ex. 17 (b)) combining figures for traffic between Great Falls and Cascade with those for traffic between Cascade and Stubbs Ferry shows a total of 2,528 tons of freight and 11,175 passengers carried (p. 2394).

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ARGUMENT

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[1.] (b) The Company claims that since the Great Falls preclude literal through use of the River and thus prevent it from forming an unbroken highway, the portion of the River here involved could not be a "navigable water" of the United States (Pet. 3, 22). But while no stream can by itself constitute an unbroken highway if at any point a land carriage or portage is necessary, such a condition is not a prerequisite to a finding of navigability. This is clear from the Act's definition of "navigable waters" which expressly includes "all falls, shallows, or rapids compelling land carriage" where the stream is used or suitable for use despite such interruptions between the navigable parts. And this definition is in accord with established principles. In *The Montello,* 20 Wall. 430, this Court rejected the lower court holding that the Fox River was not navigable by reason of "several rapids and falls" and concluded that it had always been navigable in fact, saying (20 Wall, at 442-443):

> the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country *7a which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation.

In the *Economy Light Co.* case, the Court stated that (256 U.S. at 122):

> navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages***.

And the *Appalachian* case declares that (311 U.S. at 408-9) "There never has been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries, or shifting currents."

In the instant case, the interrupting Falls cover a 17-mile section, never navigated in fact, and require a portage of about 18 miles (R. 69). But, as shown *supra*, pp. 7-8, many trips along the River were made via portage around the Falls. Such an interruption does not sever the upper 214 miles of the Missourri from the lower 2,244, but rather is merely an obstruction notwithstanding which the River was used as a continued highway in interstate commerce at least as far upstream as Stubbs Ferry. Cf. *The Daniel*

Ball, 10 Wall. 557, 563;*Pennsylvania Water &: Power Co. v. Federal Power Commission,* 123 F.2d 155, 161 (C.A.D.C.), certiorari denied, 315 U.S. 806. It follows that the presence of the Falls does not destroy the ***8a** River's status as a navigable water of the United States. [20]

20 Even if the Act's definition of navigable waters does not fully correspond with established judicial criteria, Congress clearly has the power, and the legislative history plainly indicates that it intended to exercise it (H. Rep. No. 910, 66th Cong., 2d Sess., p. 7), to regulate waters in such an interrupting reach of a navigable stream. Otherwise, its admitted power to regulate lower navigable portions of the stream could be destroyed through the location of obstructions in the interrupting reach.

***

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FEBRUARY, 1951.

***9A BRIEF AND APPENDIX FOR RESPONDENT**

No. 10200

The Montana Power Company, petitioner

V.

Federal Power Commission, respondent

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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ARGUMENT

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The historic actual use of the Missouri River in Interstate and Intrastate Commerce. - The Missouri River is formed by the confluence of the Jefferson, Madison and Gallatin Rivers at Three Forks in southwestern Montana. Generally, it flows northeastward to a point approximately 30 miles beyond Fort Benton and thence in an easterly and southeasterly direction to its junction with the Mississippi River about 17 miles above St. Louis, Missouri. Between its headwaters and its mouth the Missouri flows across or along seven States. In round figures its length is 2,475 miles; its drainage basin 529,000 square miles; and its fall 3,630 feet.

***10a** The Commission noted several facts with respect to the past actual use of the river from its mouth to Fort Benton (App. 64, 65). These facts seemingly have not been controverted by the Petitioner and the Commission's determination that the Missouri River from its mouth to Fort Benton is a navigable water of the United States is not questioned (Pet. Br. 15). Petitioner has made one contention, however, with respect to this stretch of the river which may be related to the Commission's over-all finding. That contention is that Congress by its authorization and construction of the Fort Peck Dam has abandoned "navigability" insofar as the exercise of its jurisdiction is concerned from the site of the dam upstream (Pet. Br. 18, 19; 96-102). This particular contention is discussed *infra*, p. 33.

The facts in the record with respect to the St. Louis-Fort Benton section of the river establish so completely that this part of the river was used both in its natural and improved condition for the transportation of persons and property in interstate commerce that the Commission gave only brief mention of that evidence in its opinion (App. 64-65). The opinion notes that in this so-called lower section steamboat traffic flourished from 1819 until 1888 and that this traffic between Fort Benton and points on the Missouri River downstream therefrom involved millions of dollars worth of freight and thousands of passengers.

The record in this case is clear as to the reasons for the decline of the steamboat traffic in the lower section. The Commission observed that in 1859, the very year the Missouri River steamboat reached its perfection, the railroad invasion began (App. 65). With each ***11a** westward step of the rails steamboat traffic was sharply curtailed (App. 1014). Service to Fort Benton ceased in 1888. During the period of heavy use of the lower section for navigation the river above Fort Benton was not used to any extent comparable to the use made of the lower section. The upstream terminal of large steamboats was Fort Benton (App. 64).

The real controversy in this case is related to the section of the river between Fort Benton and Three Forks. This section of the river is about 263 miles long. All of the Petitioner's hydroelectric installations on the Missouri River are located in this stretch.

Beginning about 32 miles above Fort Benton is a series of rapids and sheer falls descending about 520 feet in 17 miles known as the Great Falls of the Missouri. It has been recognized by all throughout the proceeding before the Commission that the Great Falls presented a natural barrier to steamboat traffic originating at points below. Fort Benton was sometimes labeled the

"head of navigation" (App. 1008, 1013, 1448) although the record shows that three steamboats from Fort Benton successfully navigated the river to and from points more than 30 miles upstream from Fort Benton (App. 215, 216, 1450; 1141). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft. For this upper part of the river, therefore, the "foot of navigation" was sometimes placed just above the Falls (App. 1207).

Before 1900 there was considerable use of this 263-mile reach between Fort Benton and Three Forks, the Great Falls always requiring a portage around them. In this section a number of exploratory and Government survey trips were made in manually ***12a** powered craft of various sizes. The 1805 trip under the famous explorers Lewis and Clark is perhaps the best known trip of exploration (App. 1357, 1549, 1577). These explorers with their party made a successful ascent with crude handpowered craft to Three Forks and beyond. There are only two rapids above the Falls section which have ever presented difficulty in continous [sic] navigation. These are known as Half-Breed Rapids (mile 2327) and Beartooth Rapids (mile 2365). The "Journals of Lewis and Clark" are quite detailed, particularly with respect to the difficulties encountered on this 1805 trip. The two rapids sections, however, received only casual mention.

In 1872 Thomas P. Roberts, an engineer for the Northern Pacific Railroad, made a detailed and informative survey of the 263-mile section of the stream (App. 1181). Roberts' purpose was to provide his employer with information so that plans might be laid by the railroad company for a combination boat and rail route through this area. Roberts considered his report so important that he sent it to the Chief of Engineers of the U. S. Army for the information of that officer, who in turn regarded it as so significant that it was published under the auspices of the War Department. Roberts descended the river from Three Forks to Fort Benton in a skiff. He concluded that the Missouri in the section that he had examined could be relied upon for navigation without improvement and he set forth in his report a tentative plan for utilization of this upper portion of the river with a rail link for transshipping freight around the Falls (App. 1197, 1198).

In the period from 1867 until around 1900 there was extensive intrastate use of the river between Stubbs Ferry (mile 2390), which is 85 miles below Three Forks, ***13a** and the City of Great Falls (mile 2260) for the downstream transportation of loose logs and large rafts of lumber. (App. 1142, 1210, 1256, 1264-5, 1283, 1297, 1308, 1311, 1313, 1355, 414 *et seq.*, 385 *et seq.*, 398 *et seq.*, 225 *et seq.*, 236 *et seq.*). Also, several small steamboats were placed on the river above the Falls. These boats were operated in the period after the close of the navigation era below Fort Benton and continued until around 1900 (Ex. 17-B, *lodged*). Most of the steamboat traffic in the upper section of the Missouri River took place within a 55-mile stretch known as the "Long Pool" located just above the Great Falls. This traffic consisted of a local commercial carrying of freight and passengers. One steamboat operated for a relatively long period in a scenic section of the river known as the "Gates of the Mountains." This boat was used for the purpose of carrying excursion passengers on a sightseeing trip. The vessel could and did operate over a larger section, however (App. 392, 397, 1435, 1436, 1444).

The uses of the river above Fort Benton for navigation were, for the most part, either intrastate or noncommercial in character. However, the record shows that the river between Stubbs Ferry and Fort Benton served as an artery for downstream transportation in interstate commerce of large numbers of miners following the 1864 discovery of gold where Helena is now located.

Hubert Howe Bancroft's *History of the Pacific States*, published in 1890, records such use of this part of the river for the transportation of miners returning to the States (App. 1415, 1139, 1140). A stage line was established to carry passengers from Helena to a point on the Missouri River whence Kennedy & Company ***14a** operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (App. 1140, 1417). From its general study of the navigation of the area, the Commission, in the absence of a specific description of these boats, concluded that they were probably manually powered and probably were large sharp-ended bateaux. The Commission noted in its opinion that it was not possible to fix the beginning and ending of this particular use of the river. From its study of the general historical facts relating to the area, the Commission estimated that it started soon after the 1864 discovery of gold at Helena and that it diminished soon after 1868 when most of the gold had been extracted. It assumed that any transportation of this kind must have ceased around 1870 because history records

that the placers were exhausted at about that date. The evidence in the record established satisfactorily to the Commission, however, that the business was most lively in the years 1866 and 1867 (App. 1417).

Petitioner has attacked this aspect of the Commission's findings of fact particularly and claims that this use of the river has not been established as a fact (Pet. Br. 74-8). The primary source of the information upon which the Commission relied is the historical writings of Hubert Howe Bancroft, generally acknowledged to be the foremost historian of the northwestern part of the United States as of the time his works were published. His books are considered today, by modern historians, to be an invaluable source of historical information (App. 204, 212).

It has been the use of this information derived from the Bancroft volume which has disturbed the Petitioner most, and in its briefs both before the ***15a** Commission and this Court, Petitioner has made an attempt to relate this material entirely to what it considers an improper use by the Commission of newspaper accounts as evidence. It suggests that the only real evidence of actual use of the upper section of the river in conjunction with the lower section for purposes of interstate commerce is this data respecting the movement of gold miners. It is clear from the record that the Commission did not rely solely upon the newspaper remarks and advertisements in arriving at its findings of fact. The Bancroft volume of history was the primary source of the information used by the Commission, and this Bancroft material was *corroborated* by information from contemporary newspapers of the period. It is noted further that an expert witness who was acknowledged by Petitioner to be a specialist in historical research found the Bancroft data and the newspaper material to be acceptable for purposes of historical research and so testified (App. 212). Attention will be given to the legal aspect of the claims of the Petitioner with respect to the character of the evidence used by the Commission in this proceeding in a later section of this brief, *infra*, p. 30. However, it is submitted, that the evidence of the interstate movement of the gold miners as used by the Commission is not evidence based upon conjecture, speculation, or uncorroborated hearsay. Any historical evidence respecting the movement of persons and property nearly a century ago is necessarily "hearsay" from a technical standpoint. The use by an administrative fact-finding agency of *probative* hearsay has never been proscribed.

The evidence of actual use of the upper section of the Missouri River, as summarized in its opinion (App. ***16a** 65-6-7), led the Commission to the conclusion that this stream is a navigable water of the United States and within the meaning of Sec. 3 (8) of the Act.

***

Comparison With Other Rivers Established as Navigable Waters. - Petitioner points out in its brief that the Commission in its opinion did not discuss the physical characteristics of the streams held navigable in any of the cases it cited or the evidence of use or suitability for use found in any of them; nor did the Commission make any comparison between facts in any of those cases and the facts in this case (Pet. Br. 55). The absence in the Commission's opinion of such comparisons does not mean, of course, that such comparisons were not made by the Commission in arriving at its decision. This Missouri River case is but one of many cases of its same type which have been heard and decided by the Commission. Thorough treatment of the comparable physical characteristics of the Missouri River and adjudicated streams was furnished to the Commission by its staff in the briefs filed. Comparisons between the Missouri River and the Fox River and the New River were presented to the Commission in this proceeding during an oral argument heard by it prior to its final determination.

The Missouri River between Fort Benton and Three Forks compares favorably with the New River held navigable in *United States v. Appalachian Electric Power Co., supra*, with the Fox River held navigable in *The Montello, supra*, with the DesPlaines River, held navigable in *Economy Light and Power Company v. United States, supra*, and with some parts of the Colorado River, held navigable in *United States* ***17a** *v. Utah, supra.* The space permitted in this brief will not allow a detailed presentation with respect to these other rivers, but a few of the salient facts relating to the physical characteristics of the rivers named, and the navigation which had taken place will be given.

(A) The New River

The fall between Allisonia and Hinton was established by a survey to average about 4.5 feet per mile. Comparative slope profiles of portions of the New River, held navigable by the Supreme Court in *United States v. Appalachian Electric Power Company, supra*, and the portions of the Missouri River here in question have been included in this Brief as Appendix B.

(B) The Fox River

The portion of the Fox River involved in *The Montello, supra*, was 37 miles in length, the upper 18 miles of which in their natural condition had an average fall of approximately 8 feet per mile. Within this reach the maximum fall was 29.5 feet within a distance of only three-fourths of a mile, while within another portion of 2.5 miles there was a fall of 38 feet. (Annual Report of the Chief of Engineers, 1876, p. 235; I, p.204.) Continuous navigation by boats of shallow depth was not possible because of the obstruction by shoals, rapids and falls which made portages necessary. For this reason the trial court held the entire lower Fox River nonnavigable; but the decision was reversed by the Supreme Court. Prior to its improvement by locks and dams such commerce as existed was by Durham boats propelled by animal power. These Durham boats, in size, draft and capacity, were not unlike the mackinaws used by the gold miners on the upper Missouri. A reproduction of the only available profile ***18a** of the Fox River in the portion in question has been included in this Brief as Appendix A.

(C) The DesPlaines River

The portion of the DesPlaines River in controversy in the *Economy* case, *supra*, was only 45 miles in length, 60 percent of which was pool water and 40 percent shoal water. The discharge was as much as 600 c. f. s. during an average of only 73.2 days per year. This amazing deficiency in streamflow, as computed from gage [sic] readings made daily over a 20-year period, rendered it incapable of floating a boat through 40 percent of its length during an average of 175 days per year, while lengthy portages, either of the entire cargo or parts thereof, were required during an average of 248 days per year. With the exception of an average period of 4.3 days per year, the controlling depths over the rapids were never more than 15 inches, and such controlling depths were found only during an average period of 116.2 days per year. At all other times the controlling depths were 12 inches or less, and a number of portages were required, totalling [sic] in excess of 12 miles, and consisting either of part of the cargo, the entire cargo, or both cargo and boat. During a period of 175 days it was necessary to portage not only the entire cargo, but also the boat, over 40 percent of the entire distance from Riverside to the mouth of the river, a distance of approximately 18 miles (256 F. 792, 795-6).

(D) The Colorado River

The case of *United States v. Utah, supra*, came to the Supreme Court as the court of original jurisdiction, and a Special Master was appointed to hear the evidence and submit findings and conclusions. The Special Master found that the Colorado River from ***19a** mile 176 above Lees Ferry south to the Utah-Arizona boundary was navigable. His findings were sustained by the Supreme Court (283 U.S. 64, 80-1, 82-3). This case did not involve a determination of whether the Colorado River was a "navigable water of the United States," but the same tests of navigability were used, and the Special Master stated unequivocably [sic] that he had utilized the Federal rule.

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No. 10-218

In The
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF OF THE NATIONAL WILDLIFE FEDERATION; THE NATURE CONSERVANCY; DELAWARE NATURE SOCIETY; ENVIRONMENTAL LEAGUE OF MASSACHUSETTS; INDIANA WILDLIFE FEDERATION; LOUISIANA WILDLIFE FEDERATION; MONTANA WILDLIFE FEDERATION; NATURAL RESOURCES COUNCIL OF MAINE; NORTH CAROLINA WILDLIFE FEDERATION; NORTH DAKOTA WILDLIFE FEDERATION; CITIZENS FOR PENNSYLVANIA'S FUTURE; SOUTH CAROLINA WILDLIFE FEDERATION; SOUTH DAKOTA WILDLIFE FEDERATION; TENNESSEE WILDLIFE FEDERATION; VERMONT NATURAL RESOURCES COUNCIL; WEST VIRGINIA RIVERS COALITION; WISCONSIN WILDLIFE FEDERATION; MONTANA TROUT UNLIMITED; OREGON COUNCIL TROUT UNLIMITED; RIVER MANAGEMENT SOCIETY; UTAH STREAM ACCESS COALITION AND WESTERN RESOURCE ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI*

Amici are organizations dedicated to the protection of natural resources and activities that depend on those resources. Amici represent members who comprise a substantial number of America's conservationists, paddlers, anglers, and hunters. All of amici have a strong and demonstrated interest in the ability of states, in their sovereign capacity, to protect water resources.

The National Wildlife Federation ("NWF") is a national, non-profit corporation working to protect the ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations. Founded in 1936, NWF is headquartered in Virginia and has regional offices across the country. NWF has approximately four million members and supporters nationwide. NWF members fish, hunt, and observe wildlife, and use wetlands, streams, rivers, and lakes for recreation and aesthetic enjoyment.

The Nature Conservancy ("TNC") is a non-profit corporation founded in 1951 whose mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. TNC is the largest private owner of conservation land in the United States – over 2.6 million acres – much of which includes riparian lands. Through ownership of riparian lands or in

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* The parties have filed letters with the Clerk indicating blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

partnership with others, TNC has protected over 5,000 river miles. TNC's nearly 4,000 staff members work in 50 states and 39 countries. Because of its scientific expertise and wide-ranging strategic partnerships, TNC is considered the leading global freshwater conservation organization.

The Delaware Nature Society; Environmental League of Massachusetts; Indiana Wildlife Federation; Louisiana Wildlife Federation; Montana Wildlife Federation; Natural Resources Council of Maine; North Carolina Wildlife Federation; North Dakota Wildlife Federation; Citizens for Pennsylvania's Future (PennFuture), South Carolina Wildlife Federation; South Dakota Wildlife Federation; Tennessee Wildlife Federation; Vermont Natural Resources Council; West Virginia Rivers Coalition and Wisconsin Wildlife Federation are state-based non-profit organizations affiliated with the National Wildlife Federation. All are dedicated to the conservation of fish and wildlife and their habitat including, in particular, the rivers and lakes upon which fish and wildlife depend. They are committed to a science-based, watershed approach to management of fish, wildlife, and water resources, and to preserving opportunities for recreation in and on the waters subject to the public trust.

Montana Trout Unlimited ("MTU") and Oregon Council Trout Unlimited ("OCTU") are affiliates of Trout Unlimited, a national non-profit corporation founded over 50 years ago with more than 140,000 volunteers organized into about 400 chapters from Maine to Alaska. OCTU has 2,836 members in five chapters, each formed around a watershed; MTU has thirteen river-based chapters, comprised of approximately 3,400 volunteer members. MTU's and

OCTU's members are avid anglers dedicated to the conservation, protection, and restoration of wild and native trout and salmon in their watersheds.

The River Management Society ("RMS") is a national non-profit professional organization. The mission of the Society is to support professionals who study, protect, and manage North American rivers. Dedicated to holistic river management, its diverse membership includes federal, state, and local agency employees, educators, researchers, consultants, organizations and citizens. The objective of RMS is to advance the profession of river management by providing managers, researchers, educators and others a forum for sharing information about the appropriate use and management of river resources. RMS builds its organization with a broad base of expertise in all aspects of river management and stewardship including an ecosystem approach to recreation, water quality, riparian health, and watershed management.

The Utah Stream Access Coalition ("the Coalition") is a Utah non-profit corporation with over 1,000 members. The Coalition's mission includes restoring and preserving the public's right to use Utah's public waters for recreational and other lawful purposes, and securing recognition that the title to the beds of all navigable waters is in the state of Utah in trust for the people. The Coalition is currently involved in litigation in the Utah state courts seeking a determination that the Weber River, the site of commercial log drives in the late 1800s and early 1900s, meets the federal navigability for title test.

Western Resource Advocates ("WRA") is a regional organization dedicated to protecting the

West's land, air and water. Founded in 1989, and headquartered in Boulder, Colorado, WRA works in eight states of the interior West (Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, and Wyoming). Core program areas include creating a clean energy future and curtailing climate change, defending public lands and iconic landscapes from the impact of energy development, and protecting rivers and water supplies. WRA staff, members, and supporters rely on western rivers for working, fishing, recreating, researching, and aesthetic enjoyment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to address the proper test for determining navigability for title, which governs whether a state holds title to waters and submerged lands under the Equal Footing doctrine. *See* Pet. i; 131 S. Ct. 3019 (2011).

The case presents issues of great importance to amici and their members. As this Court's decisions emphasize, ownership of navigable waters and the lands beneath them has traditionally been regarded as a central aspect of state sovereignty because these resources serve vital public interests. Long before the founding of the United States, public trust principles have protected citizens' rights to engage in commerce and enjoy fisheries in navigable waters. The basic premise of the Equal Footing doctrine is that ownership of navigable waters and their submerged lands is an essential attribute of statehood; a state deprived of that ownership would not share fully in what it means in our constitutional system to be a state.

In many states, the public trust extends beyond commerce, navigation, and fisheries to a variety of other public values such as protecting natural ecosystems and providing opportunities for recreation. State governments' ability and responsibility to protect these values, and the public's ability to enjoy them, depend upon a stable and rational test for determining navigability for title.

The rule advocated by petitioner PPL Montana, LLC ("PPL"), which affirmatively promotes highly fragmented ownership of rivers and other waterbodies, would interfere with consistent resource management and likely impair the public's interests in the management and protection of these valuable resources. Amici fully recognize that neither federal ownership nor private ownership of river resources is inherently incompatible with protecting river resources; but a rule of fragmentation like that urged here is certain to harm public interests and interfere with the practical needs of river management.

As we explain below, the test urged by PPL – which would eliminate state ownership of river segments that had to be portaged at statehood – is inconsistent with longstanding precedent and would destabilize title to rivers and their beds that has long been considered soundly vested in the states. Fragmenting ownership in this way would impair the states' ability to protect fisheries and river ecosystems and provide public access for recreation.

Contrary to PPL's rendition, the Montana Supreme Court correctly applied this Court's decisions setting forth the test for navigability for title. It is instead PPL and its supporters that urge

the Court to abandon its traditional inquiry – whether a waterbody serves as a highway for commerce – and embrace instead a new test that would be difficult to administer and would invite piecemeal challenges that would fragment state ownership of navigable waters.

As we demonstrate below, the Montana Supreme Court's consideration of evidence of log drives was consistent with settled precedent, which recognizes that such activities were a central mode of commerce throughout much of the country at the time many states were admitted to the Union, and can establish that a river served as a "channel of useful commerce" at statehood.

The Montana court also properly considered post-statehood recreational use as evidence of a river's susceptibility to use as a highway of commerce at statehood. Allowing such proof of "susceptibility" is particularly important to enforcing the Constitution's Equal Footing doctrine, given the sparse populations and undeveloped economies of many states upon their entry into the Union, as well as the evolution of commerce since that time.

ARGUMENT

I. THE RULE THAT STATES OWN THE NAVIGABLE WATERS AND THE LANDS BENEATH THEM IS DEEPLY ROOTED AND SERVES VITAL SOVEREIGN AND PUBLIC INTERESTS

A. State Ownership of Navigable Waters and the Lands beneath Them Is Central to State Sovereignty

PPL discusses the Equal Footing doctrine as if it were a disfavored common-law technicality or a historical relic, to be applied grudgingly, without regard to the doctrine's purposes or history. But state ownership of navigable rivers and riverbeds is deeply ingrained in both state and federal law. This Court has repeatedly emphasized that the doctrine serves state and public interests of the highest order, and the Court has rejected narrow and restrictive approaches similar to those advocated by PPL here.

This Court has explained that

> lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States,* 482 U.S. 193, 195 (1987). The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Lessee of Waddell,*

> 16 Pet. 367, 410 (1842). Then, in *Lessee of Pollard v. Hagan,* 3 How. 212 (1845), the Court concluded that States entering the Union after 1789 did so on an "equal footing" with the original States and so have similar ownership over these "sovereign lands." *Id.,* at 228-229.

Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 283 (2001). Thus, states' title to navigable waters and the lands submerged beneath them "is 'conferred ... by the Constitution itself.'" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374 (1977). *See also Pollard*, 44 U.S. (3 How.) at 230 ("To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.").

The Equal Footing doctrine extends to waters that were navigable in fact at the time of a state's admission to the Union. *See United States v. Utah*, 283 U.S. 64, 76 (1931). Rivers are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel in water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). Navigability does not depend on the particular mode of use of a waterway, but instead on whether "the stream in its natural and ordinary condition affords a channel for useful commerce." *Utah*, 283 U.S. at 76 (quoting *United States v. Holt State Bank*, 270 U. S. 49, 56 (1926)). In *Utah*, for example, the Court accepted statehood-era evidence

of navigation on various stretches of the Green and Colorado Rivers by timber rafts, rowboats, flatboats, steamboats, motorboats, barges and scows, "some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying, and mining operations." *Id.* at 79, 82.

B. Sovereign Title to Navigable Waters Derives from their Vital Public Benefits

The Equal Footing doctrine flows from the recognition that navigable waters and their submerged lands implicate exceptionally important public interests, and that that states are trustees of these resources for the benefit of their citizens. As early as 1842, the Court held that the "public trust doctrine" – the "absolute right," vested in the people of the new republic, to "to all their navigable waters, and the soils under them" – defeated an oyster harvester's claim to own the land below the high water mark of Raritan Bay. *Martin v. Lessee of Waddell,* 16 Pet. 367, 410 (1842). This Court's elaboration of the Equal Footing doctrine in *Shively v. Bowlby*, 152 U.S. 1, 26 (1894), followed from the longstanding public trust character of submerged lands. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (referring to *Shively* as the "seminal case in American public trust jurisprudence") (citation omitted).

The states hold title to navigable waters and the lands under them in their sovereign capacity "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892).

While the public character of submerged lands dated back to English common law and earlier, American law "enhanced and extended" that principle – by, among other things, extending sovereign title to navigable streams and lakes not subject to the tides. *Coeur d'Alene Tribe*, 521 U.S. at 284. The interests of the sovereign and the public in navigable waters were especially acute here because of inland waterways' central place in the growth and commerce of the young nation and in the survival of its people. *See Barney v. Keokuk*, 94 U.S. 324, 338 (1876) ("[P]ublic authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience."); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Canal Comm'n v. People ex rel. Tibbits*, 5 Wend. 423, 460 (N.Y.1830) ("Had the common law originated on this continent we should never have heard of the doctrine that fresh water rivers are not navigable above the flow of the tide").[1]

States' public trust doctrines, and state statutes effectuating public trust principles, continue to safeguard the uses historically protected – commerce, navigation and the fishery – as well as

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[1] *See also* 43 U.S.C. § 1311(a)(1) (Submerged Lands Act provision declaring it to be "in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources" be confirmed and vested in the states).

rights of public access. Many state judicial decisions have held that the public trust embraces protection of other public values, such as water conservation, protection of aquatic ecosystems, and recreation.[2]

Because state ownership of navigable waters and their submerged lands carries with it a variety of protections for the public interest in water resources, the navigability for title question has significant implications for the public at large.

A ruling for PPL here could have repercussions even beyond unsettling state titles, insofar as a number of states have adopted the navigability for title test to determine the right to recreational uses of rivers. State ownership of streambeds under the navigability for title test is often a critical element of state law regarding public recreational rights to rivers and streams. *See* 4 *Water and Water Rights*, §30.01(a) ("The public right to use water in place frequently is founded upon state sovereign ownership of navigable waters and the land beneath them."); *see also* A. Dan Tarlock, *The Law of Water Rights and Resources*, at 494 (2011); Robin K. Craig, *A Comparative Guide to the Eastern Public Trust*

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[2] *See* 4 Waters and Water Rights § 30.02(a) (Robert E. Beck, *et al.*, eds.. 2010) (overview of the public trust doctrine); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 331, 379 (1998) (describing trust protection for recreational and ecological values associated with navigable waters); Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 Tul. Envtl. L.J. 315, 377 (2009); *see also In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000); *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d. 457 (N.D. 1976).

Doctrines: Classifications of States, Property Rights, and State Summaries, 16 Penn. State Envtl. L.J. 1 (2008); Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology Law Q. 53 (March 2010); *Arkansas v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980).[3]

Particularly in states where the federal navigability for title test directly governs public recreational rights, a federal standard that segments rivers into "navigable" and "non-navigable" according to what obstacles may have existed on a river is to place fishermen and boaters in the untenable position of having to decide when, in a given circumstance, a river is open to use and when it is not. *See Northwest Steelheaders Ass'n v. Simantel*, 112 P.3d 383 (Ore. App. 2005) (rejecting criminal trespass claims against anglers who had fished on section of John Day River on which navigability and state ownership were disputed), *review denied*, 12 P.3d 65 (Ore. 2005). The likely result will be

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[3] In other states, including Montana, navigability for title does not determine the public's right to access rivers for fishing and boating; that right is governed by a more liberal standard. *See Montana Coalition for Stream Access v. Curran*, 683 P.2d 163, 170 (Mont. 1984). It is, of course, well within a state's authority to determine its citizens' recreational access to the state's waterways. *See id.* ("Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes."). But even in such states, losing ownership of sections of rivers and their submerged lands would work a significant restriction in state authority and the loss of statutory protections and public trust obligations uniquely applicable to state-owned lands.

escalating conflict between members of the public and the purported "owners" of the river.

II. PPL'S PROPOSED TEST IS INCONSISTENT WITH PRECEDENT

PPL's central submission is that a proper understanding of the navigability for title test would have focused only on the natural obstructions on the Missouri and Clark Fork Rivers and denied navigability because those segments themselves were not navigated by vessels – despite the acknowledged fact that pre-statehood travelers and traders portaged around these obstructions to continue their progress along the river. *See* PPL Br. 15-16, 40, 41. The United States, as amicus, urges that the obstructed reaches (including the Great Falls themselves) and any other river obstacles that needed to be portaged, must be excised from the title that passes to the state under the Equal Footing doctrine. *See* U.S. Br. at 7 ("Although portaging may connect *navigable* segments into a continuous highway for commerce, portaging around a non-navigable segment does not make *that* segment navigable for title purposes.") (emphasis in original).

The path-marking decisions of this Court do not point PPL's way. Navigability for title is governed by the "navigability in fact" test articulated in *The Daniel Ball*, and consistently applied in Equal Footing doctrine cases. Under that test,

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which trade and travel are or may be

> conducted in the customary modes of trade and travel on water.

77 U.S. at 563 (emphasis added). The *Daniel Ball* test is uncongenial to PPL's segmentation argument here; for under the test articulated by the Court, what becomes "public" or state-owned is the *river*, not *segments* of the river.

This Court's decisions have been marked by practical recognition of the widely varying conditions under which different states entered the Union and the inequity of diminishing a state's sovereign entitlement because it was sparsely populated or economically undeveloped at statehood.[4] Thus, the Court has made clear that it suffices if a river was *susceptible* to serving as a channel of commerce, *see Utah*, 283 U.S. at 76, and has refused to impose rigid limits on the types of activity that can establish that a river served as a useful channel of commerce, *see id.*; *St. Anthony Falls Water Power v. St. Paul Water*

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[4] Census figures suggest how extraordinarily sparsely populated the Western territories were on the eve of statehood. The 1890 Census, conducted the year Idaho and Wyoming joined the Union, and the year after Montana did, reported the following populations for these enormous states (each one of which covers an area far larger than all of New England): Idaho – 84,385; Montana – 132,159; Wyoming – 60,705. U.S. Census Office, Report on Population of the United States at the Eleventh Census, Part I, lxviii (1895). The population density for the three states was 1.0, 0.91, and 0.62 persons per square mile, respectively, *see id.* at xxxv, a tiny fraction of the density of most of the original states a century earlier. The census for 1850, conducted a year after California became a state, tallied 92,597 (not counting Native Americans), yielding a population density of 0.49 persons per square mile. U.S. Census Office, Abstract of Census Legislation of the United States, 1790 to 1850 Inclusive xxxiii (1853).

Comm'rs, 168 U.S. 349, 359 (1897) (finding navigability based on evidence of floating "logs with shutes that are artificially prepared" even though it was argued that the stretch was not navigable "by boat"); *infra*, pp. 28-32.

This Court elaborated upon the navigability in fact test in *The Montello*, 87 U.S. 430, 439, 442-43 (1874), where it found Wisconsin's Fox River had been navigable in fact in its natural state even though the river in that condition was obstructed by several rapids and falls, necessitating portages. The Court rejected the lower court's decision against navigability, which was based "chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation." *Id.* at 442. The Court acknowledged that these obstructions made navigation difficult, but noted that even with these difficulties, "commerce was successfully carried on." *Id.* As the Court explained:

> [T]he rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country *which were so interrupted by rapids as to require artificial means to enable them to be navigated without break*. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the *best* instrumentalities for carrying on commerce, but *the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce*. If this be so the river is navigable in fact, although its navigation may be encompassed with

> difficulties by reason of natural barriers, such as rapids and sand-bars.

Id. at 443 (emphases added).

The Montello disposes of PPL's segmentation argument, because it establishes that the need to portage around an obstacle does *not* defeat navigability. *See* Montana Br. 28-31. The United States (Br. 25) attempts to dismiss *The Montello* on the ground that it was not a title case, but the *Montello* Court explicitly held, based on *The Daniel Ball* test that the United States concedes (Br. 9) governs navigability for title purposes, that the Fox River "has always been navigable *in fact*." *The Montello*, 87 U.S. at 443 (emphasis added). And this Court and lower courts have repeatedly cited *The Montello* as stating the law for purposes of navigability for title. *See* Montana Br. 30-31.

PPL bases its arguments for segmentation and excision primarily upon *United States v. Utah*, 283 U.S. 64 (1931), which it says authorizes denying navigability when there is a non-trivial obstacle to vessel passage. But this reading of the case is itself improperly segmented; it takes out of context a few passages that, read in context, are entirely unsupportive of PPL's position. As Montana explains at length, the portion of the Colorado River found non-navigable in *Utah* — the impassable reach within Cataract Canyon – undisputedly represented a "dead end" (Montana Br. 31) to trade navigation – no one passing upriver or downriver could or did portage the canyon to engage in continued commerce on the river. *See* 283 U.S. at 77. Thus, under the settled *Daniel Ball/Montello* test (which the Court applied to all of the disputed

reaches in the case), the river ceased to be a useful channel or highway for commerce at that point.[5]

In contrast to the dead-end obstacle in *Utah*, there was no dead end at either the Missouri River's Great Falls or the Clark Fork's Thompson Falls; to the contrary, both were regularly portaged, and both rivers served as highways for commerce both above and below the respective falls. *See* Montana Br. 34-35. Neither *Utah*, nor any other authority, provides for a denial of navigability in such circumstances.[6]

PPL's and the United States' theory that river reaches that required a portage must be excised from state sovereign title would mean that states' ownership of navigable rivers is shot through with interruptions. Each falls, rapid, riffle, or obstacle significant enough to have required a portage would be separated out from state ownership of all of the

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[5] The *Utah* opinion bears little resemblance to PPL's rendition of it as establishing a grudging and demanding standard: The Court applied *The Montello*; it sustained navigability over numerous exceptions by the United States, including that sand bars precluded a finding of navigability; and it emphasized that susceptibility for use in commerce is sufficient, specifically, various vessels plied the segments for exploration; pleasure; the transport of passengers and supplies; and prospecting, surveying, and mining operations. 283 U.S. at 67, 82, 87.

[6] As Montana explains (Br. 35), *Oklahoma v. Texas*, 258 U.S. 574 (1922), does not support PPL's proposed rule. Nor does *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922) (cited at PPL Br. 35; US Br. 14, 18), authorize considering a river segment in isolation; the Court there found that the navigational head of the Arkansas River was downstream of the reservation lands in question, 260 U.S. at 86. Thus, the upstream, non-navigable portion was not part of a highway for commerce under the *Daniel Ball* test.

portions of the river that statehood-era boats did pass through. Given that most navigable rivers were marked by "serious obstacles to uninterrupted navigation," *The Montello*, 87 U.S. at 443, this rule would make a patchwork pattern of state and non-state ownership of rivers extremely common.

But, as Montana points out, the extreme segmentation of ownership that PPL's rule would produce – thousands of federal or private inholdings along the beds of navigable rivers – does not in fact prevail. *See* Montana Br. 39 & n. 14; *Canal Comm'n*, 5 Wend. 423, at 464 (holding that private claimant failed to show title to a waterfall in the Mohawk River).

To be sure, as *Utah* illustrates, a natural obstacle may destroy the practical utility of a river for commerce – rendering the river non-navigable upstream or downstream of the obstacle. But the navigability inquiry requires consideration of the relationship of that interruption to commerce along the river; when commerce passed around the obstacle by portage or otherwise, and continued along the river above or below the obstacle, the river is navigable, and there is no excision of the obstructed segment from the State's ownership. A "segment" of river is *only* non-navigable if it is not part of a useful channel for commerce. *See The Montello*, 87 U.S. at 442-43.

Contrary to PPL's contentions, the Montana Supreme Court carefully examined, and adhered to, the precedents of this Court. *See* 53a-62a. It did not, as PPL charges, adopt a casual "whole river" test that would find navigability whenever any part of the river supported commerce. And aspersions on the state court's motives are as unwarranted here as

such aspersions would be against a federal court adjudicating a claim of ownership by the United States.[7]

III. PPL'S FRAGMENTED ANALYSIS OF NAVIGABILITY FOR TITLE WOULD INTERFERE WITH THE PUBLIC TRUST AND IMPAIR STATES' ABILITY TO MANAGE NATURAL RESOURCES

In addition to being inconsistent with this Court's precedents, PPL's proposed approach would be highly problematic for the public interests the Equal Footing doctrine is intended to safeguard. PPL tellingly makes no serious attempt to explain its favored segmentation approach in terms of the purposes and policies of the Equal Footing doctrine.

The Equal Footing doctrine is built upon a recognition that navigable waters serve vital public interests, particularly commerce, navigation, and fisheries, that state governments exist to protect. While rivers may lack the unrivalled economic importance they had in 18th- and much of 19th-century America, rivers' economic importance remains great – and includes not only transportation of persons and goods from point to point, but also enormously valuable uses such as sport fishing, whitewater rafting, canoeing and a host of other

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[7] Skepticism about state courts' ability to resolve submerged lands claims is hard to square with *Coeur d'Alene Tribe*, which required a federally recognized Indian Tribe to go to Idaho state court to resolve its federal law-based claims of ownership to a lakebed. 521 U.S. at 288.

recreational activities.[8] Moreover, scientific study has only broadened our understanding of the critical roles rivers play in sustaining entire ecosystems – a function that has prompted a further set of state laws and programs to protect these public resources.[9]

A rule that chopped up sovereign title to rivers wherever waterfalls, rapids, sand bars, vegetation, or myriad other natural obstacles required Statehood-era travelers to portage would directly undermine those interests. It would invite third-party "owners" (and claimants) to engage in activities in rivers without regard to the public interest in these resources and fragment the trust responsibility over the river.

It would be hard to design a rule more inimical to effective river resource management than one that extracted from state ownership every place along a river that 19th-century navigators had to portage. It is now widely understood that fragmented management authority can seriously frustrate efforts to protect fisheries, aquatic ecosystems, water

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[8] In 2006, anglers in the United States spent $26.3 billion on freshwater fishing trips and equipment. *See* U.S. Fish & Wildlife Service & U.S. Census Bureau, National Survey of Fishing, Hunting and Wildlife-Associated Recreation 10 (2006).

[9] *See, e.g.*, Lawrence L. Master, *et al.*, eds., *Rivers of Life: Critical Watersheds for Protecting Freshwater Biodiversity* 14-15 (TNC 1998) ("Freshwater habitats provide for many of our fundamental needs: water for drinking and irrigation, food in the form of fishes and waterfowl; and in-stream services such as flood control, transportation, recreation and water quality protection. Health river systems retain water and buffer the effects of storms, reducing the loss of life and property to floods. Naturally vegetated streamside riparian zones help trap sediments and break down nonpoint source pollutants.").

quality, and other natural resources and amenities.[10] A large body of scientific literature supports the proposition that, to the extent possible, ecosystems should be managed in a holistic, landscape-scale manner, and administrative fragmentation should be avoided.[11] The extreme fragmentation resulting from the approach PPL and its amici propose would impede effective natural resource management.

Excising from state ownership river reaches that at statehood contained waterfalls, rapids, sandbars and other obstacles is all the more problematic because such features often have exceptional importance in terms of public trust values. For example, reaches punctuated by navigational

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[10] *See, e.g.*, Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 Envtl. L. 973, 981-1003 (1995) (discussing imperatives for watershed-based approaches to river management); J. A. Stanford, *et al.*, *Ecological Connectivity in Alluvial River Ecosystems and its Disruption by Flow Regulation*, 11 Regulated Rivers: Research & Mgt. 105, 116 (1995) ("Resource managers must become 'conservators of ecological connectivity'"); N. Leroy Poff, *et al.*, *The Natural Flow Regime: A Paradigm for River Conservation and Restoration*, 47 Bioscience 769, 769-70 (1997) (explaining that water resources management has suffered from "fragmented responsibility," making it "difficult, if not impossible, to manage the entire river ecosystem").

[11] Karen A. Poiani, *et al.*, *Biodiversity Conservation at Multiple Scales: Functional Sites, Landscapes, and Networks*, 50 Bioscience 133, 134 (2000) ("a growing appreciation of the enormous complexity and dynamic nature of ecological systems led to the concept of ecosystem management, wherein success is best assured by conserving and managing the ecosystem as a whole"); Norman L. Christensen, *et al.*, *The Report of the Ecological Society of America on the Scientific Basis for Ecosystem Management*, 6 Ecological Applications 665, 669 (1996); John Copeland Nagle, *et al.*, The Law of Biodiversity and Ecosystem Management (2d ed. 2006).

obstructions such as boulders, sandbars or logjams that may have made boat passage hazardous or impossible often create the pools, riffles and other geomorphic areas that are vital habitats for fish and other species. *See* J.D. Allan, *Landscapes and Riverscapes: The Influence of Land Use On Stream Ecosystems*, 35 Ann. Rev. Ecol. Evol. Syst. 257, 260 (2004); Kurt D. Fausch, *et al.*, *Landscapes to Riverscapes; Bridging the Gap Between Research and Conservation of Stream Fishes*, 52 Bioscience 483, 483 (2002).[12] These features are critical to the maintenance of river ecosystems, and they are especially important to the health of aquatic species.[13] Moreover, reaches that might have required portage at statehood may be especially important for recreation and scenic enjoyment. *See* Montana Br. 39 (citing example of Niagara Falls);

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[12] *See also* Timothy J. Beechie, *et al.*, *Process Based Principles for Restoring River Ecosystems*, 60 Bioscience 209, 209-211 (2010) (noting that fish are highly adapted to natural, dynamic processes such as erosion, channel migration, and recruitment of woody debris); Burchard H. Heede, *et al.*, *Hydrodynamic and Fluvial Geomorphological Processes: Implications for Fisheries Management and Research*, 10 N. Am. J. Fisheries Mgmt. 249 (1990).

[13] An example is the bull trout, which occurs in the Clark Fork and is listed as a threatened species by the U.S. Fish and Wildlife Service. Bull trout need deep runs with unembedded boulder and cobble substrates, and pools with large woody debris. Scientists advocate maintaining natural connections and a diversity of complex habitats over a large spatial scale to maintain dispersal of bull trout populations. C.C. Muhlfeld, *et al.*, *Seasonal Movement and Habitat Use by Subadult Bull Trout in the Upper Flathead River System, Montana*, 25 N. Am. J. of Fisheries Mgmt. 797, 797 (2005). These management approaches may be taken to scale to benefit not just the bull trout but an entire ecosystem.

Mont. Code Ann. § 1-1-501 (depiction of Great Falls on Montana's state seal). Thus, quite apart from its dissonance with this Court's precedents, PPL's rule is a particularly undesirable one from the perspective of states' sovereign ability to pursue a rational natural resources policy. *Cf. Pollard*, 44 U.S. (3 How.) at 230 (emphasizing importance of ownership of navigable rivers to "numerous and important" state powers).

A rule that fragmented ownership and management authority over navigable rivers among states, the federal government, and private parties would be likely to create jurisdictional and policy conflicts. Fish and wildlife, of course, move freely across property lines and jurisdictional boundaries, but a patchwork of management regimes is likely to disserve even shared management goals. Furthermore, managing fragmented lands is expensive and inefficient – a point that federal agencies frequently make when they pursue policies designed to minimize fragmentation.[14]

Finally, there is real irony in PPL's efforts to invoke interests in stability of title and settled expectations. *See, e.g.*, PPL Br. 47, 57; Br. of Creekside Coalition, *et al.* 11-12, 24-27. For it is PPL

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[14] *See* Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 Hastings W.-N.W. J. Envtl. L. & Pol'y 55, 59 (2002) ("Increasingly since 1981, both the [Bureau of Land Management (BLM)] and the [U.S. Forest Service] have 'used exchanges to dispose of fragmented parcels of land to consolidate land ownership patterns to promote more efficient management of land and resources.'") (citation omitted); BLM, Land Exchange Handbook H-2200-01 at 1-1 (characterizing land exchanges as an "important tool to consolidate ownership for more effective management") (Aug. 31, 2005); *id.* at 11-1 to 11-2 (discussing assembled land exchanges).

that seeks an abrupt change in the law of navigability. A rule inviting challenges to state title whenever intermittent obstacles required Statehood-era travelers and traders to portage would impose massive burdens on states to defend titles long thought to be settled. As noted above, such a rule would invite conflicts between public users of navigable rivers and riparian owners who believe that a waterfall, rapid, or riffle along the shore ousts public ownership of portions of the river passing their land.

Such a new rule would present serious problems of proof – especially daunting if, as PPL insists, it would be the State's burden to show that a particular reach was *not* portaged in statehood days. *See* PPL Br. 54; *but cf.* U.S. Br. 20 n. 11. Whether trappers or traders portaged around a particular rocky reach of river more than a century ago is likely to be extremely difficult and costly to determine. Evidence whether travelers ran or portaged a particular river segment is likely to become even sparser over time.

Because of these difficulties, and the sheer volume of property at issue, PPL's proposed test would impose massive burdens on state governments, and would divert state resources toward defending title to isolated pieces of their sovereign lands.

IV. PPL'S OTHER ATTACKS ON THE MONTANA SUPREME COURT'S LEGAL ANALYSIS ARE UNFOUNDED

Although most of its attention is devoted to advocating the segmentation theory, PPL also challenges certain other features of the Montana Supreme Court's decision, including its reliance on evidence concerning log drives and evidence of post-statehood recreational use to demonstrate navigability for title. But these arguments are similarly mistaken.

A. The Montana Supreme Court Properly Relied upon Evidence of Log Drives as Evidence of Navigability

The Montana Supreme Court was well within the mainstream of settled legal opinion when it relied on evidence of log drives, an especially important commercial use of rivers in nineteenth century America, in considering the navigability of the Madison and Clark Fork Rivers.

From the mid-1800s to the early 1900s, many rivers across the northern half of the Nation served as vital highways of commerce for the logging industry. *See* Robert E. Pike, Tall Trees, Tough Men (2000) (New England); Earl E. Brown, Commerce on Early American Waterways (2010) (Mid-Atlantic); Malcolm Rosholt, The Wisconsin Logging Book, Palmer Publications (1980) (Midwest); William H. Wroten, The Railroad Tie Industry in the Central Rocky Mountain Region: 1867-1900 (Ph. D. thesis, U. Colo. 1956) (Rocky Mountains); Heritage Research Center, Montana Navigable Water Study (submitted to Montana Department of State Lands December 1986); Montana Br. 12-13.

Log drives arrived in the Rocky Mountains in the 1860s with the construction of the transcontinental railroad, which needed 2,400 wooden "ties" for every mile of track. Wroten, *supra.* Log drives were also vital to the mining industry in the West, supplying prop timbers for mine shafts and tunnels, and cordwood to make charcoal for ore smelters. *See* Charles S. Peterson, *et al.*, A History of the Wasatch–Cache National Forest (report submitted to the U.S. Dept of Agriculture 1980); Gregory C. Crampton, *et al.*, The Navigational History of Bear River— Wyoming, Idaho, Utah (U. of Utah 1975).

This country abolished the European practice of allowing riparian landowners and local authorities to extract tolls and duties from loggers driving the river. Brown, *supra.* Beginning as early as 1771, laws declared many eastern American rivers to be "public highways." *Id.* This principle extended into the Midwest by virtue of the Northwest Ordinance which declared that "[t]he navigable waters leading into the Mississippi and the Saint Lawrence, and the carrying places between, shall be common highways, and forever free, . . . without any tax, impost, or duty therefor." Northwest Ordinance, Art IV (adopted 1787), 1 Stat. 52 (1789). In the 1800s, Western territories adopted laws recognizing rivers as public highways, often for the specific purpose of protecting public log driving rights. For example, in 1872 the Colorado Territory adopted a law stating that "it shall be lawful for any person . . . to float and all kinds of timber . . . down any of the streams of this Territory . . . ." Colo. Gen. L. § 1856 (1872). *See also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 431-38 (1989). Early case law in the West also

recognized this public right. *See Idaho Northern R. Co. v. Post Falls Lumber & Mfg.*, 119 P. 1098, 1101 (Idaho 1911) ("Any stream in which logs will go by the force of water is navigable.") (quoting and endorsing standard from Oregon decisions).

When Montana and the other Rocky Mountain states entered the Union in the late 1800s, log driving was not just a common commercial use of the waterways; it was vital to the Nation's development. Not surprisingly, modern state and federal court decisions in the West have relied on a history of log drives to find that rivers meet the federal navigability for title test. *See Oregon Div. State Lands v. Riverfront Protection Ass'n,* 672 F.2d 792 (9th Cir. 1982) (McKenzie River in Oregon); *State v. Bunkowski,* 503 P.2d 1231 (Nev. 1972) (Carson River in Nevada); *Montana Coalition for Stream Access*, 682 P.2d 163 (Dearborn River in Montana, ultimately decided on state law grounds); *see also* 33 CFR § 329.6 (regulatory definition of navigability includes commercial log drives). The leading modern treatise discussion of navigability for title concludes that "[t]he use of water to drive logs to market qualifies." 4 Waters and Water Rights, § 30.01(d)(3)(C).

B. Evidence of Post-Statehood Recreational Uses Can Support Navigability in Fact at Statehood.

Since title to the lands beneath navigable waters passes to a State upon its admittance to the Union, the navigability of a State's rivers must be determined as of that date. *Utah*, 283 U.S. at 75. PPL has challenged the Montana Supreme Court's use of post-statehood evidence, claiming that such evidence is only permissible under narrow

circumstances, namely, when "conditions of exploration and settlement explain the infrequency or limited nature of [actual] use." Br. at 45 (quoting *Utah*, 283 U.S. at 82). PPL's assertion, however, ignores key language in the opinion. Nor has any subsequent court read the language PPL quoted to limit post-statehood evidence in the way PPL advocates.

In *Utah*, the Court confirmed that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are *or may be* conducted in the customary modes of trade and travel on water." 283 U.S. at 76 (quoting *The Daniel Ball*, 77 U.S. at 563 and citing *Holt State Bank*, 270 U.S. at 56) (emphasis added); *accord The Montello*, 87 U.S. at 441 ("[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, *or may be*, conducted") (emphasis added). Neither in *The Daniel Ball* nor in *Holt State Bank* did the Court limit the "susceptible of being used" phrase in the manner PPL claims.

Utah did not hold that "[e]vidence of 'susceptibility to use' . . . is rarely relevant to whether a river was navigable at statehood," PPL Br. at 43, or that such evidence is "irrelevant[] outside the context of remote and undeveloped rivers." *Id.* Rather, the Court held that "[t]he extent of existing commerce is not the test." 283 U.S. at 82. In the section of the opinion PPL relies upon, the Court did not prescribe a general limitation on the consideration of a river's susceptibility to use, but confirmed the appropriateness of considering

susceptibility in the circumstances of the case at hand:

> In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. . . . The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce *as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources*. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

283 U.S. at 83 (emphasis added). *Utah* makes clear that the navigability inquiry is not confined to the specific kinds of activities or vessels that were present at statehood. *See also Alaska v. United States,* 662 F. Supp. 455, 463 (D. Alaska 1987), *aff'd sub nom. Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Courts determining navigability for title after *Utah* have not construed the phrase "susceptible of use" narrowly. *See, e.g., Ahtna,* 891 F.2d at 1405.

The only limitations on consideration of post-statehood evidence are that the physical characteristics of the body of water must be similar to those present at statehood, and the vessels employed in post-statehood uses must be comparable to vessels available at the time of statehood. When physical characteristics have changed since statehood to make river *more* amenable to

navigation, *i.e.*, to enable post-statehood uses that would not have been possible at statehood, evidence of those post-statehood uses ordinarily will not support a finding of title navigability. *N.D. ex rel. Bd. of Univ. and Sch. Lands v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) (finding river non-navigable because of changed physical characteristics of river, in spite of evidence of modern use of canoes comparable to boats in use at statehood); *see also Ahtna*, 891 F.2d at 1405 (finding river navigable based on modern uses where parties had stipulated that physical conditions of the river had not changed since statehood). Courts have also considered the characteristics of the post-statehood watercraft, specifically, their draft (hull depth in water) and their weight-bearing capacity. *Id.* (finding weight-bearing capacity of contemporary boats comparable to those used at time of statehood).

PPL also maintains that *recreational use* may not be considered as evidence supporting a finding of navigability. Br. at 49. There is no merit to that proposition, however, and courts have frequently accepted evidence of recreational use of a body of water in determining navigability for title purposes. *See* U.S. Br. at 31 & n.16 (acknowledging this point).

Contrary to PPL's claim that the Court in *Utah v. United States* "went out of its way to avoid placing any weight on recreational use," Br. at 51, the Court in that 1971 decision expressly cited an "excursion boat" in its survey of the evidence supporting a finding of navigability, 403 U.S. at 12; *accord Utah*, 283 U.S. at 82 (characterizing evidence of post-statehood activity of boats, including "some [used] for pleasure," as "properly received" by the special master and as "relevant upon the issue of the

susceptibility of the rivers to use as highways of commerce" at the time of statehood); *Ahtna*, 891 F.2d at 1405 (finding that guided fishing and sightseeing trips qualify as commercial activity for purposes of establishing navigability for title); *North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) (finding evidence of uses including modern recreational canoe use to support title navigability because such use was a "viable means of transporting people and goods" at the time of statehood), *rev'd on other grounds sub nom. Block v. N.D.*, 461 U.S. 273 (1983); *Northwest Steelheaders Ass'n*, 112 P.3d at 391-92 (finding navigability for title based in part by recreational use); *Defenders of Wildlife v. Hull*, 18 P.3d 722, 734-35 (Ariz. Ct. App. 2001).

Where courts have found waters non-navigable in spite of evidence of recreational uses, the reason has not been that the uses were recreational, but that they were "demonstrably ineffective," *United States v. Oregon*, 295 U.S. 1, 23 (1935), or that they occurred in river conditions that differed significantly from those present at the time of statehood. *North Dakota*, 972 F.2d at 240 (finding river non-navigable because river's physical characteristics changed, in spite of evidence of modern use of canoes comparable to boats in use at statehood).

In *United States v. Oregon*, the Court determined the navigability in fact of three small lakes and the two waters that connected them, finding that all but one "disappear completely or become negligible during a dry season." 295 U.S. at 16. The fifth measured less than two feet in depth over half its area and in the summer was largely "made up of

small lakes or ponds, separated by mud or dry land." *Id.* at 17. Most of the areas covered by water were also covered with thick vegetation. *Id.* Based on these conditions, the Court found "impracticable" the two activities offered as evidence of navigability, trapping and boating. *Id.* at 20-22. Trappers had to operate largely by wading, and boaters had to get out and pull their craft frequently, encountering "impenetrable" vegetation and a "labyrinth of channels" that they had to mark with flags to return safely. *Id.* Thus, the Court did not reject evidence of uses because of their "recreational" character, as PPL maintains, Br. at 50, but because the physical characteristics of the waters could not support those uses. Of course, in the territories, activities such as fishing, hunting, rafting, and canoeing, which are primarily recreational today, were often essential for subsistence and basic commerce.

Likewise, the remaining cases PPL cites do not support the claim that "courts have routinely found evidence of recreational use insufficient to establish title navigability." *Id.* In the first of the two early-twentieth century appellate decisions PPL invokes, the court found Big Lake non-navigable despite the use of "canoes, skiffs, and dugouts." *Harrison v. Fite*, 148 F. 781, 786 (8th Cir. 1906). The court made this finding, however, not because these uses were recreational, but because of the physical characteristics of the lake and the river: the lake was "largely a tangled jungle, choked with willows, aquatic growth, and dead trees and stumps," and during most of the year the lake bed was visible and used as pasture. *Id.* The water body at issue in *North American Dredging Co. of Nevada v. Mintzer*, 245 F.297, 299 (9th Cir. 1917), was a channel cutting

through a tidal salt marsh; the court emphasized that the bottom of the channel was "practically exposed" at low tide, rendering navigation of any sort possible only during times of high water. Neither decision, then, rested on the "recreational" character of the uses.

Further, *Harrison* and *American Dredging* predate the Court's key decisions on navigability for title, *United States v. Utah* and *Utah v. United States*, as well as more recent decisions within the same circuits that expressly upheld the relevance of recreational use to title navigability determinations. *North Dakota*, 671 F.2d at 278; *Ahtna*, 891 F.2d at 1405. *Harrison* and *American Dredging*, then, and not *Ahtna*, 891 F.2d at 1405, are best understood as "outliers," Br. for Petitioner at 52, and do not support the contention that recreational uses may not provide evidence of navigability for title.[15]

In sum, evidence of recreational use is sanctioned, not forbidden, by previous court decisions. Where courts have found waters non-navigable, it was not because the uses were recreational, but because the physical characteristics of those waters rendered any navigation impracticable. Recreational uses may support a finding of navigability for title, and post-

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[15] In addition to *Harrison* and *American Dredging*, PPL cites to two state court cases. In both cases, the courts focused on the inland lakes' lack of any connection with any other body of water. *Taylor Fishing Club v. Hammett*, 88 S.W. 2d 127, 129-30 (Tex. Civ. App. 1935); *State v. Aucoin*, 20 So. 2d 136,160 (La. 1944). Furthermore, in *Aucoin* the physical characteristics of the lake made navigation impracticable. 20 So. 2d at 160 (finding that boats often became bogged down and had to be dragged through the mud of lake "surrounded by cypress swamps and impassable prairie").

statehood recreational uses such as sport fishing, whitewater rafting, and canoeing are properly considered as evidence of a waterway's navigability.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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